Judicature
THE JOURNAL OF THE AMERICAN JUDICATURE SOCIETY
SEPTEMBER-OCTOBER 2002 VOL 86 NO 2

JUDICATURE. The Journal of the American Judicature Society (ISSN 0022-5800). Volume 86, Number 2, September-October. Published bimonthly. Institutional subscriptions $54 a year, single issues, $10; Foreign $66 a year, single issues, $12. Individual subscriptions available only through membership in the American Judicature Society. Address changes, editorial communications, and notices on Form 3579 are to be sent to 180 N. Michigan Ave., Suite 600, Chicago, Illinois 60601.

COVER DESIGN: ESTELLE CAROL

Editorial

Restoring confidence in the criminal justice system

Through its planned national conference on preventing the conviction of innocent persons, AJS hopes to help restore public trust and confidence in the criminal justice system.

We all make mistakes. The wise among us recognize the critical importance of learning from those mistakes. The quest to learn the lessons our mistakes can teach us propels hospitals to conduct examinations of patient deaths, governments to dissect train wrecks and airplane crashes, and law enforcement agencies to review fatalities that may have been caused by errors in judgment by police officers. After-the-fact reviews in search of lessons to be learned from serious mishaps are a deeply rooted aspect of public policy, in almost every area except in the area of criminal justice. Seldom, if ever, is there a systematic evaluation of why someone was wrongfully convicted and what can be learned from that type of mishap. Public trust and confidence in our justice system as a whole, and specifically in the results of trials in our states' criminal justice systems, is threatened by the conviction of innocent persons and further damaged when the professionals who work in the system do not respond to such mistakes by investigating their causes and making appropriate changes.

AJS is convening a *National Conference on Preventing the Conviction of Innocent Persons—A Review and Examination of Responses* January 17-19, 2003 in order to explore the causes of convictions of innocent persons and learn from various jurisdictions' responses to those causes. Five-member teams from 12 jurisdictions around the United States will attend the conference to examine causes and develop plans to respond to the relevant issues in their jurisdictions.

These teams will reflect the diversity of the criminal justice system. Judges, prosecutors, law enforcement professionals, criminal defense attorneys, legislators, and victims' rights advocates all play important roles in the criminal justice system. Their teamwork is necessary to an effective examination of the issues in their jurisdictions and to a workable and productive response to any problems their jurisdiction may face regarding the conviction of innocent persons.

At one time it was thought reasonable to believe that fundamental miscarriages of justice either did not occur or occurred so rarely that there was simply no need for review. The advent of DNA has removed that argument entirely from the debate. To date, DNA alone has accounted for 110 demonstrated and undeniable cases in which there was a conviction of the innocent. In every one of these cases DNA proved the innocence, but in every one of them something else convicted the defendant in the first place. We know what some of those things are. Faulty eyewitness identification, unreliable informant testimony, false confessions, faulty scientific testimony, poor crime scene work, inadequately funded public defender organizations, and occasionally misconduct by prosecutors or law enforcement have all been identified as contributors.

AJS's mission to improve the administration of justice parallels the criminal justice system's goal of fair and equal justice. With this conference, AJS seeks to assist responsible and forward thinking teams in their efforts to ensure that their jurisdiction's criminal justice system serves that goal. As a nonpartisan national organization, AJS offers teams a neutral forum to learn and plan. Teams will examine what has been done in other jurisdictions and begin to develop plans to fit their specific needs. They may choose to initiate reviews of identified cases of convictions of innocent persons, based on the experiences of the Canadian and English review commissions, to increase training for police, public defenders, and crime lab personnel, or to videotape interrogations, among other possible responses.

AJS recognizes the challenges to implementing reform. We also recognize the importance of fostering and nurturing public trust and confidence in the justice system. Convictions of innocent persons have damaged that trust and confidence, and a response is necessary to repair and rebuild them. AJS hopes the *National Conference on Preventing the Conviction of Innocent Persons* will provide the necessary resources and impetus to examine the issues and fashion a response that will correct existing errors, prevent future mistakes, and rebuild public trust.

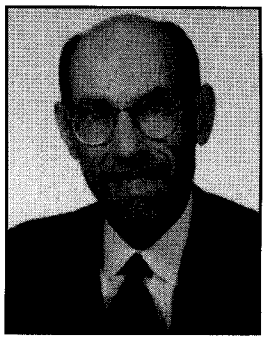
Editorials are prepared by a committee of the American Judicature Society appointed by the president.

AJS
American Judicature Society
Since 1913

From the executive vice president and director

At the very core of why AJS exists

by Allan D. Sobel



AJS will conduct a national criminal justice conference in Alexandria, Virginia from January 17-19, 2003. Jurisdictional teams from across the country will attend to consider the lessons that can be learned from examining cases that have been determined to involve the wrongful conviction of an innocent person. The lessons will be instructive as to the systemic reforms that might be implemented to prevent similar wrongful convictions. The teams will consist of judges, law enforcement officials, victim rights advocates, legislators, prosecutors, and criminal defense attorneys.

The conference is a major undertaking by AJS. Planning started two years ago. Initially, we conducted an investigation to determine the feasibility of successfully conducting a national conference to consider ways to avoid convicting the innocent. Forty-four people were interviewed, including nine chief justices, nine trial court judges, law enforcement officials, probation department officers, state court administrators, legal scholars, judicial educators, journalists, prosecutors, and defense attorneys. The response we received encouraged us to move forward.

In preparing, we have been guided by an outstanding national advisory committee chaired by AJS Vice-President Larry Hammond. The professions represented on the jurisdictional teams that will attend the conference are also represented on the advisory committee. We have also been informed by focus group meetings in San Diego, Chicago, and Phoenix, where AJS brought together a wide variety of local participants in the criminal justice system to find out how we might best tailor our conference to meet their needs. Today, with few exceptions, the entire AJS staff is busy drafting the agenda, building jurisdictional teams, designing and conducting surveys, preparing publications, working on a media plan, lining up faculty, securing endorsements from cooperating organizations, assembling handout materials, and making travel and meal arrangements.

From my perspective, the work of this conference is as important as any that AJS might be doing now. It goes to the very core of why AJS exists: to preserve and build trust and confidence in the justice system.

Media coverage has alerted citizens to the problem of innocent people being wrongfully convicted, incarcerated, and in some cases even sentenced to death. If an innocent person can be sentenced to death for a crime committed by another, and the responsible party is not held accountable and may be free to prey on others, it suggests to the public that the criminal justice system is broken and its results are unreliable. This conference will help restore trust and confidence in the system as it evidences a proactive effort by the system's regular participants to examine and develop options for addressing systemic failures leading to wrongful convictions. The public's trust and confidence in our criminal justice system will continue to rise if post-conference reform efforts around the country are successful.

I salute the members of the teams who will participate in this conference. The conference would not be possible absent their sense of responsibility, commitment to the highest standards, and willingness to devote their valuable time and efforts to the common good. I recently read and was greatly impressed by the *American Society of Crime Laboratory Directors Guidelines for Forensic Laboratory Management Practices.* In part it states, "We are the holders of a public trust because a portion of the vital affairs of other people has been placed into our hands by virtue of the role of our laboratories in the criminal justice system." This sense of responsibility will also guarantee a successful conference and restoration of the public's trust and confidence in the criminal justice system.

Tentative Plenary Session Agenda
National Conference on Preventing the Conviction of Innocent Persons

Potential Targeted Responses to Identified Causes of Wrongful Convictions

Panel Discussion—Finding Common Ground

Learning From Mistakes—Models of Investigation

Systemic Costs of Convicting Innocent Persons

Cost-Benefit Analysis

Political Concerns

ASK THE ADR PROFESSIONALS

News You Can Use from the National Arbitration Forum

These responses to current inquiries are prepared by the professional staff of the Forum to assist judges and judicial administrators in taking full advantage of ADR's benefits to the Courts.

What do judges really need to know about arbitration?

Judges need to know how to properly review arbitration proceedings and awards to assure that they comply with the rapidly developing arbitration law.

The United States Supreme Court has held that the Federal Arbitration Act (FAA) governs all arbitration agreements and awards involving interstate commerce. The broad reach of the federal commerce clause covers virtually all transactions, including commercial, employment, consumer, healthcare, contract, tort, real property, financial, and all types of claims and disputes, making them all subject to the FAA.

It is the FAA, and not contrary state laws, that govern the enforceability of arbitration agreements and awards. The U.S. Supreme Court concluded that the FAA preempts all conflicting state laws (statutory, case law, rules) that are anti-arbitration or that restrict the use of arbitration permitted by the FAA. During its last two terms, the Supreme Court issued several important arbitration decisions, reaffirming its prior holdings supporting the wide spread use of arbitration as a way to resolve all types of disputes by all sorts of parties.

What ever happened to "judicial hostility" towards arbitration?

Any previous judicial hostility toward binding arbitration has been replaced by judicial approval and support. Federal and state trial and appellate courts have embraced the use of arbitration to resolve civil disputes. The U.S. Supreme Court and other courts have unequivocally declared an end to the obsolete judicial hostility toward arbitration. Courts presently approve and encourage the use of arbitration agreements resulting in arbitration hearings and final, binding awards. Many federal and state jurisdictions also support or require the use of non-binding arbitration and mediation in litigated cases, before any trial can take place. Both private arbitration and court mandated public arbitration provide remedies and relief to many parties with civil disputes.

How do judges and arbitrators work together toward the common good?

The new era of arbitration has created a blend of private and public dispute resolution systems that afford everyone access to civil justice. Parties can first have their case decided by an arbitrator following fair procedures, which are required to incorporate due process standards. If they choose, the parties can have a judge review both the process and the award to make sure each complies with the law and is fair. The arbitrator acts as a "private magistrate" and the judge acts like a public judge. This blend of roles benefits all participants in the civil justice system.

What is the primary role of the courts in this arbitration/judicial partnership?

Judges have an obligation to assure parties have access to just, speedy, and inexpensive civil justice. The litigation system, unfortunately, denies many Americans this opportunity. Arbitration allows judges to meet their obligations by reviewing arbitration procedures and awards to make sure justice is being done, without having to delay or deny civil justice.

What are the primary sources of arbitration law?

There are three primary sources of arbitration law: The Federal Arbitration Act, federal court cases, and state law.

The first and major source of arbitration law is the FAA, enacted by Congress in 1925, and interpreted by many U.S. Supreme Court and federal court decisions. The FAA is short and easy to understand: Broadly, the Act allows parties to agree to arbitrate their disputes, and the award issued by an arbitrator is final and binding and subject to review by a court.

Many federal court cases comprise the second major source of legal authority. The United States Supreme Court alone has issued numerous major opinions regarding arbitration and the FAA during the past decade, all supporting its use in all types of cases with all types of parties.

State law – state court decisions and state statutes – constitute the third major source of arbitration law. That source will be explained in the next *Ask the ADR Professionals.*

INTRODUCTION

WRONGFUL CONVICTIONS OF THE Innocent

BY MICHAEL L. RADELET, SYMPOSIUM ISSUE EDITOR

This year marks the seventieth anniversary of the publication of the classic study of erroneous convictions in both capital and non-capital cases by Yale Law Professor Edwin M. Borchard.[1] Several other twentieth century scholars followed in Borchard's footsteps, including Erle Stanley Gardner (whose work became the foundation for the "Perry Mason" television series),[2] Judge Jerome Frank and his daughter, Barbara,[3] and Tufts University philosopher Hugo Adam Bedau.[4]

The body of research these writers produced was always controversial. As recently as 1987, two Justice Department attorneys who were asked by then-Attorney General Edwin Meese to critique research on erroneous convictions concluded that the risk of error "is too small to be a significant factor in the debate over the death penalty."[5] History has proved them to be wrong, but one of those attorneys, Stephen J. Markman, is now a member of the Michigan Supreme Court; the other, Paul G. Cassell, is a federal district judge.

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Despite their dismissal of the problem, a 2001 Harris Poll found that 94 percent of American adults believed that innocent people are "sometimes" executed.[6] A 2001 poll by Washington Post-ABC News found that 51 percent of Americans support suspending executions until questions involving the fairness of its application can be studied.[7] In July 2002, an "Innocence Protection Act," which will provide death row inmates with better access to DNA evidence and better qualified attorneys, passed the Senate Judiciary Committee. The bill already has the endorsement of the majority of the House of Representatives.

Two major developments in the last dozen years have led to the increase in public concern about erroneous convictions. The first involves only capital cases. Since 1972, there have been more than 100 inmates released from America's death rows because of doubts about guilt, if not absolute and definitive proof of innocence.[8] In most cases, evidence of innocence emerged not because "the system works" (as Lawrence Marshall demonstrates in his essay in this issue), but by pure luck.

The second development has been the advent of DNA testing, which has demonstrated conclusively that the pioneers who were raising concerns about erroneous convictions were basically correct.[9] While DNA is available for testing in only a small proportion of felony cases, its use in exonerating convicted defendants has confirmed the existence of all sorts of problems, including erroneous eyewitness identification, false confessions, perjury by prosecution witnesses, and a wide assortment of improprieties and shortcomings by police, prosecutors, and defense attorneys. The odds of such blunders in any single case are low, but collectively they lead to a significant (but unknown) number of erroneous convictions. This number would undoubtedly rise exponentially if one counted, for example, the number of defendants convicted of first-degree murder who, on some hypothetical objective standard, should have been convicted of a lesser degree of criminal homicide or acquitted on grounds of self-defense, accident, or insanity.

While the problem of erroneous convictions affects all felony cases, there is some evidence to suggest that the problem is especially acute in capital cases. This assertion at first seems illogical, as one would hope that the more severe the punishment and the more a given case is litigated, the less likely the probability of error. We know that abolishing the death penalty would eliminate the worst possible consequences of erroneous convictions, but would it reduce the

1. Borchard, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932).
2. Gardner, THE COURT OF LAST RESORT (1952).
3. Frank and Frank, NOT GUILTY (1957).
4. Bedau, *Murder, Errors of Justice, and Capital Punishment*, in THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 434 (Bedau ed., 1964); Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).
5. Markman and Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).
6. *See* (http://www.pollingreport.com/crime.htm).
7. *Id.*
8. For a list of these defendants, *see* (www.deathpenaltyinfo.org/innocencecases.html).
9. *See* (www.innocenceproject.org).

actual prevalence of wrongful convictions as well?

Professor Sam Gross has identified several features of capital cases that makes them more, not less, vulnerable to error than other felonies.[10] In especially brutal homicides (the kind most likely to become death penalty cases), the pressure on the police to arrest a suspect is immense. In cases with thin evidence that otherwise might not result in an arrest or prosecution, the pressure may result in an indictment. The prosecutor, rather than dismissing or plea-bargaining the charges, may feel compelled to "let the jury decide." Witnesses may be more likely to lie or embellish testimony in capital cases, perhaps to divert attention from their own role in the crime or to win favors and attention to a degree not available in non-capital cases. Pressure on the police in potentially capital cases may lead them to induce false confessions unintentionally. Pretrial publicity may infect jurors, and the process of eliminating those who stand opposed to the death penalty from capital juries will result in juries that are more "conviction prone" and sympathetic to the prosecution than in other felony cases.[11]

New insights

In light of increasing concern among criminal justice system professionals about erroneous convictions, and to address issues of public trust and confidence in the criminal justice system, the American Judicature Society is sponsoring a National Conference on Preventing the Conviction of Innocent Persons from January 16–19, 2003 to examine relevant issues and potential responses. The conference will be attended by diverse teams of criminal justice system professionals, including prosecutors, judges, law enforcement officials, criminal defense counsel, and victims' rights advocates, and by legislators. While exonerations of defendants under a sentence of death have served in part to draw attention to the erroneous conviction problem, capital cases represent a small percentage of all criminal cases, leading to the inference that most erroneous convictions occur in non-capital criminal cases. Therefore, the conference will address the causes of convictions of innocent persons generally rather than limiting inquiry to capital cases.

In addition to the conference, the American Judicature Society is publishing this symposium issue of *Judicature*. In it, some of the country's top authorities in criminal justice in general, and erroneous convictions in particular, add new insights into the problem. The issue begins with an essay by Travis County (Austin, Texas) district attorneys Ronald Earle and Bryan Case, who write about two cases of erroneous convictions that were handled by their office. Robert Olson, Chief of Police in Minneapolis, follows with observations from the point of view of law enforcement about causes (and solutions) to the problem of erroneous convictions.

Next are three papers from legal scholars. James Liebman, Professor of Law at Columbia, explains why we can be so certain that innocent defendants are occasionally executed, even if no one can point to DNA or other evidence that would prove, beyond any question, that a specific executed defendant was totally uninvolved in the crime. Northwestern University Law Professor Lawrence Marshall develops this theme by examining 13 cases in which innocent people were sentenced to death in Illinois, showing that they were vindicated only because of Lady Luck, and not because "the system works." Finally, Ronald Huff, Dean of the School of Social Ecology at University of California-Irvine, describes research that he and a colleague have been conducting for the past 15 years on erroneous convictions. Unlike any other published research, Huff's paper adds an international dimension, telling us how the problem of erroneous convictions is handled in Australia, France, and Spain.

The next two papers provide concrete suggestions for how the criminal justice system can learn from its mistakes and reduce the probability of future miscarriages. Barry Scheck and Peter Neufeld, the nation's leaders in the use of DNA in criminal cases, suggest the formation of "Innocence Commissions," similar to those formed by the National Transportation and Safety Board to investigate airplane crashes, to examine and extract lessons from cases in which convicted inmates have been exonerated. Thomas P. Sullivan, former U.S. attorney for the Northern District of Illinois and co-chair of Illinois Governor George Ryan's Commission on Capital Punishment, discusses several recommendations for reform presented by that Commission in April 2002. These recommendations have relevance both to capital and non-capital cases.

Gerald Kogan, former Chief Justice of the Florida Supreme Court, follows with his observations about miscarriages of justice, gleaned from 40 years of service as a prosecutor, defense attorney, trial judge, and member of the state supreme court.

We end the symposium with an essay-review based on several books and reports that have discussed various aspects of wrongful convictions. Written by Hugo Adam Bedau, the dean of American death penalty scholars (whose work on erroneous convictions goes back four decades), this essay gives readers suggestions for where to turn for more information about erroneous convictions. It also shows how the volume of research in this area has grown exponentially.

Overall, this symposium contains perspectives from prosecutors, law enforcement officers, the judiciary, scholars, defense attorneys, and people with first-hand knowledge of erroneous convictions. The essays provide several areas of agreement. It is hoped readers will find these agreements, as well as the respectful disagreements, to be provocative.

10. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW. & CONTEMP. PROBS. 125 (1998).

11. American Psychological Association, *In the Supreme Court of the United States:* Lockhart v. McCree*: Amicus Curiae Brief for the American Psychological Association*, 42 AM. PSYCHOLOGIST 59 (1987).

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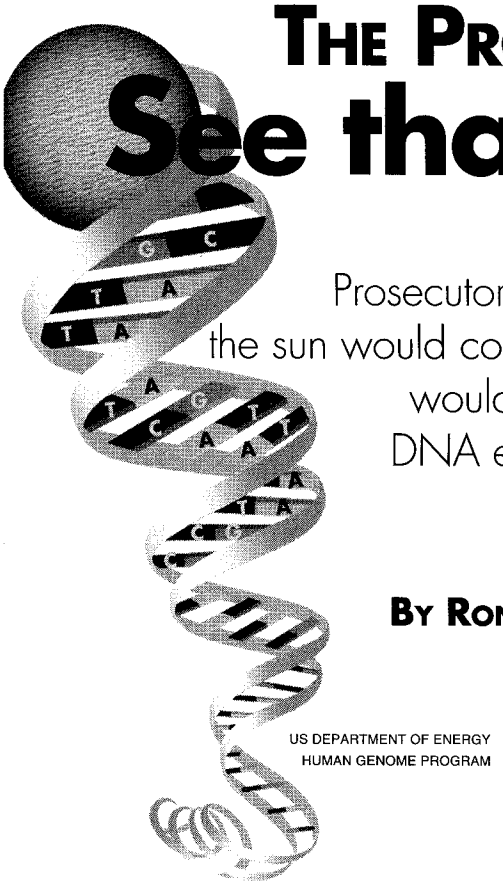

US DEPARTMENT OF ENERGY
HUMAN GENOME PROGRAM

Prosecutors in Austin, Texas were convinced that the sun would come up in the West before an innocent person would be convicted in their jurisdiction; DNA evidence has demonstrated to them they were wrong.

BY RONALD EARLE AND CARL BRYAN CASE, JR.

The discovery of three mistaken convictions in the past few years has led the Travis County (Austin, Texas) District Attorney's Office to reexamine convictions obtained during the past 20 years in which DNA evidence might have made a difference in the outcome. This article discusses those cases, the setting in which they occurred, and the procedural and policy implications they present.

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Carlos Lavernia

On June 3, 1983 law clerk Bryan Case and District Attorney Ronald Earle arrived at work to learn that the Barton Creek rapist had claimed another victim the previous evening. The Barton Creek Greenbelt was, and is, a favorite of hikers, bikers, swimmers, and nature lovers as it meanders toward the outskirts of the city. For the previous year, however, its five-mile path had produced three sexual assaults, several attempted sexual assaults, two murders, and an alarmed populace. Hindsight declares that law enforcement should have suspected more than one person, but the attacker was commonly referred to as "the Barton Creek rapist." This idea was reinforced by a composite drawing that produced a high number of suspicious person reports. One such report yielded Carlos Lavernia resting near the entrance to the Greenbelt.

Lavernia arrived in the United States courtesy of Fidel Castro's Mariel boatlift of 1980. In February, 1982, Lavernia was arrested in Austin for exposing himself to a young girl at an elementary school near the Greenbelt. Later, he was arrested while burglarizing a vehicle in a nearby neighborhood, and in May employees at the

nearby Barton Springs swimming pool reported him for exposing himself to swimmers. Police noted that he could barely speak English.

In June of 1982 Lavernia was placed on 10 years probation for the felony exposure incident, and in April, 1983 he was involved in an automobile wreck near the Barton Springs pool. On August 8, 1983, nine days after the last Greenbelt attack, Lavernia was reported by a jogger as matching the description of the composite drawing of the Barton Creek rapist. By the end of 1983 the convicted Lavernia had landed in the Federal Detention Center in Atlanta. Ten months later he was charged as the Barton Creek Rapist.

The locomotive. By the spring of 1984 the lieutenant in charge of the sex crimes detail had grown frustrated by the failure to solve the Barton Creek rape cases. In a last effort he began to go through sexual assault disposition sheets from the previous two years, running "handlebys" on convicted offenders.

Lavernia's packet certainly contained red flags. Significantly, the assaults had stopped roughly around the time Lavernia left Austin. The lieutenant assembled a photo lineup and contacted the victims from the last two sexual assaults, which occurred on June 2, and August 4, 1983. The June 2 victim positively identified Lavernia as her assailant and the August 4 victim tentatively identified him. Lavernia was brought to Austin, placed in a live lineup, and then identified by the August 4 victim. Lavernia was then indicted in both cases, even though neither victim noted that their assailants had trouble speaking English. Victims from the remaining cases failed to identify his photograph.

Prosecutors realized that the August 4 incident was not a strong case since the victim had been tentative in her first identification. The victim of the June 2 incident seemed to be a good witness; however, there was an inconsistency. She described her attacker as being about her height, which was 5'10". Lavernia was 5'4", but this fact did not seem too noteworthy to either the prosecutors or the jury because the terrain in the Greenbelt is rough and rocky, making height comparisons difficult. Perhaps this discrepancy would have taken on more significance if not for Lavernia's unusual behavior.

As the case progressed through the judicial system, the primary actors became even more convinced that the right man was charged. Lavernia quickly became known for his intransigence and hostility toward his lawyer, the judge, the victim, and anyone who came within his gaze. If the jury had lingering doubts about the victim's identification, those doubts were crushed by the image of his icy glare. They did not take long to find him guilty and sentence him to life in prison. It never occurred to them that there might be other reasons for his way of behaving.

Back on track. The criminal justice system had not looked favorably upon Carlos Lavernia. This inclination worsened after trial. Prison, a rough place under any circumstance, is especially hard on sex offenders. Eventually Carlos Lavernia converted to Buddhism, and to this day is still proud of his leather bound meditation book. Along the way he filed three writs of habeas corpus attesting to his innocence and berating the victim, his lawyer, and the trial judge. The responding prosecutors dismissed him as simply another sexual deviant in denial.

Months turned to years. In the fall of 1999 homicide detective J.W. Thompson was asked to review some "cold" murder cases, one of which was commonly attributed to the Barton Creek rapist. In prison Lavernia told Thompson that he had never murdered anyone, and also insisted that he was not guilty of the Barton Creek sexual assaults. In February, 2000 Thompson received a letter from Lavernia asking that his DNA be compared to DNA from the sexual assault case in addition to the murder case. Laboratory tests excluded Lavernia in the cold murder, but Thompson determined there was nothing remaining to test from the sexual assault case in the police evidence room.

In July Lavernia wrote Thompson again, asking if he had followed up on the request. Unsure how to proceed, Thompson contacted Case at the District Attorney's Office. Both remembered that the Barton Creek rapist had been convicted on the basis of one eyewitness, but they had not realized that the conviction was based only on that witness. They decided to order DNA testing.

After much searching, Case's secretary, Darcie Webb, finally located a single manila envelope in a county warehouse with the Lavernia case number on it. Inside were all of the exhibits that had been admitted into evidence, including the victim's jogging shorts and dried swabs from the rape exam. The biological evidence was sent to the laboratory. No one thought further about the Barton Creek rapist because they believed only the slimmest of chances existed that this DNA test would be eventful. Astonishingly, two weeks later Lavernia was excluded as being the contributor of the DNA.

Thompson, Case, and Clay Strange, the office's DNA expert, were especially stunned by this development since they had spent the preceding two weeks preoccupied with trying to determine whether Richard Danziger and Christopher Ochoa really had anything to do with the 1988 Pizza Hut murder case, for which they had been serving life sentences since 1990.

Danziger/Ochoa

Shortly after 7:00 a.m. on October 24, 1988, a 22 year-old mother was preparing to open the Reinli Street Pizza Hut. At 9:30 a.m., unable to contact her by phone, a concerned manager entered the store and found her nude body lying in several inches of water, hands behind her back. The store had been flooded in an attempt to destroy evidence, and the young woman, who had been sexually assaulted, was shot in the back of the head.

Two weeks later Richard Danziger and Christopher Ochoa, employees of another Austin Pizza Hut, visited

the victimized store for a drink. As they were leaving, an overly curious Danziger asked the security guard about the crime scene—how the sink was clogged and whether the murder weapon was a .22 caliber pistol. Suspicious, the guard then alerted police, who brought Ochoa in for questioning.

During Ochoa's initial interview his face and neck broke out in reddish stress blotches when asked about the murder. The commander then spoke with Ochoa alone. He came out of the room within five minutes, announcing that Ochoa was ready to give a statement about Danziger. What influenced him to so easily buckle is best understood only by Christopher Ochoa, but during the course of three interviews over two days Ochoa gradually implicated first Danziger, and then himself, more and more, culminating in a brutally explicit description of how both had repeatedly raped the young woman before executing her. The final written confession was remarkable in its macabre detail. What makes it more remarkable, indeed surreal, is the fact that it was completely false. A man named Marino was responsible for this horrible crime.

Achim Josef Marino. Achim Marino was born in Germany and became the adopted son of an American G.I. and a German woman. At eight years of age he experienced a vision in which larger than life beings ridiculed, insulted, and derided him. As the years passed the beings became more specific in their taunts and in schooling him according to their value system, which extolled evil and scorned virtue. From age 12 until 16 he lived in a residential treatment center but was successful in thwarting help. Doctors tried to convince him that the visions were hallucinations, but Marino knew they were real.

During his second trip to the penitentiary in the mid 1980s Marino learned from satanic writings that one could capture the personal power of another by killing that person. He committed himself to carrying out this rite of passage when released from prison. Four months later Marino, following through on his pledge, gained entry into the Pizza Hut that October morning pretending to be a repairman. Soon the young mother lay dying on the floor, her blood trailing through the cold morning water.

Of evil and arrogance. In 1990 Marino was in jail again, charged with two aggravated robberies and an old sexual assault. A cellmate told the incredulous Marino that recently two men had pled guilty and received life sentences for the Pizza Hut murder from two years back. A few weeks later Marino pled guilty to his three charges in exchange for a life sentence. The sexual assault was related in a curious way to the Pizza Hut case. Two months before the Pizza Hut murder, Marino had entered Ace Tailors early one Saturday morning intending to rob, sexually assault, and kill the clerk. Achim Marino had not cared for most people who had drifted through his life, but he had loved his first wife. Marino would later reveal that the counter clerk at Ace Tailors greatly reminded him of her. He robbed her with the same pistol that would later become a murder weapon, then sexually assaulted her, but could not bring himself to shoot her. The *modus operandi* of the Pizza Hut murder was remarkably similar to the Ace Tailors case. Investigators made no connection, of course, since they already had the men who were good for the Pizza Hut killing.

In prison again, Marino wound up at one of the roughest places in the Texas Department of Corrections. Fear and aging finally led the tormented Marino to a prison counselor, then to a chaplain. He now says that this spiritual journey led him to seek forgiveness, not only for the pain he had intentionally inflicted, but also for the wrong suffered by two innocent men.

In 1996 Marino mailed a letter to the Austin Police Department and the daily newspaper, confessing to the Pizza Hut murder and offering details of the crime. Marino claimed handcuffs that were used to bind the young woman, the .22 caliber handgun, and a bank-bag were at his parents' house in El Paso. He did not simply set forth the facts, but also mixed in references to his mental state. Homicide detail had completely changed personnel since the 1988 investigation and detectives thought the letter had the ring of truth to it, but also believed that its author was psychotic. Nevertheless, a homicide detective was sent to El Paso and returned with these items. However, the investigation fizzled after ballistics tests were unable to confirm the .22 as the murder weapon.

Astonishingly, two weeks later Lavernia was excluded as being the contributor of the DNA.

The following year, 1997, Marino mailed a second letter, this time to the police department and to the district attorney, discussing the crime more. This time a homicide detective and a Texas Ranger were sent to talk with Ochoa in prison. They asked him if a third person had been involved. Ochoa told them no, it happened just as he testified at Danziger's trial. Detectives thought that Ochoa was lying to protect Marino, and began trying to establish a link between the two. They spent more than two years tracking down Marino's irredeemable associates in a frustrating attempt to establish this

mistaken proposition.

The investigation alternatively proceeded and languished until the spring of 2000 when police received a letter from John Pray at the University of Wisconsin, saying that he was representing Ochoa, who was now claiming innocence. He asked that DNA evidence be preserved. Police and prosecutors decided that DNA testing should be done immediately. Fortunately the Texas Department of Public Safety (DPS) DNA laboratory had saved portions of the biological specimens.

Anticipation of test results differed greatly from the Lavernia case. This time there was a strange sense of impending disaster, not because prosecutors expected a third person's DNA to be present, but because they dreaded the hopeless uncertainty of not being able to exclude Ochoa and Danziger. DNA evidence had been introduced in the 1990 trial, although there had not been enough sample to employ the "fingerprint" technique. Rudimentary analysis had placed Ochoa in the 10 percent of the population who could have contributed the unknown DNA. Also, a hair similar to Danziger's had been found at the crime scene. Obviously there could be no reconciling Ochoa's trial testimony and prison statements with Marino's letters, but prosecutors still were not ready to accept Ochoa's belated claim of innocence.

The initial results from the DPS lab seemed to confirm these fears. An unknown third party's DNA was by far the predominant component of the victim's sample, but there also appeared to be very low levels of three genes foreign to Marino and in common with Ochoa and Danziger. However, after careful retesting, the lab was able to conclusively determine that the sample only contained the complete DNA profile of a single individual. Tests later showed that Marino's DNA perfectly matched the profile of this unknown DNA from the autopsy swab. Additionally, sophisticated ballistics testing conclusively established that the pistol earlier retrieved from Marino's parents' house was the murder weapon.

The two remaining issues were whether the victim had been sodomized, and whether her hands had been bound with her brassiere. Autopsy findings included what appeared to be four small puncture wounds in the rectum and the conclusion that these wounds were "consistent with" sexual assault by an unknown object. Ochoa's final written statement asserted that he had tied the young woman's hands behind her back with her brassiere and that both he and Danziger repeatedly sodomized her. The medical examiner and responding officers had testified that prominent ligature marks appeared on the wrists. This scenario did not match what Marino told detectives upon his return to the Travis County jail. Marino insisted that he had not sodomized the woman, and that he had bound her wrists with handcuffs.

Detectives and prosecutors then showed the medical examiner photographs taken prior to autopsy, while the victim was being maintained on life support awaiting organ harvest. The medical examiner recognized a black cord running underneath the body as a rectal thermometer, and stated that during the eight hours on life support the victim's body would have been turned several times, perhaps not too gently, and that this was the cause of the puncture wounds four inches inside the rectum. Among that same group of photographs was one of the victim's wrists. Both wrists displayed two ligature marks that were parallel, about one eighth of an inch apart. Case and Strange pressed Marino's handcuffs against their wrists, which produced identical impressions in the prosecutors' skin.

Other details began to fall into place. Marino told detectives that before sexually assaulting the young woman he handcuffed her behind the back and then pulled her blouse and brassiere up over her head and down her clasped arms. Further review of the medical records revealed that emergency medical personnel had initially described the victim's arms and hands as being behind her back with her brassiere loosely wrapped around her wrists.

After sexually assaulting the young woman, Marino said he took her to the restroom where he instructed her to kneel beside the counter so he could handcuff her to it. Instead, he shot her in the back of the head and she fell forward underneath the lavatory, accounting for the large pool of blood there. He then pulled her out of the restroom looking for the shell casing. Unable to find it, he flooded the restaurant in an attempt to remove possible fingerprints from the shell, which had been dragged under the victim's body into the hallway where it was thereafter discovered. Ochoa in his written statement described an elaborate story of shooting the victim in the hallway, bringing her into the restroom to wash her body in the lavatory, and finally taking her back to the hallway for further assault. That was how Ochoa accounted for the pool of blood under the lavatory, blood droplets on the counter, and the shell casing in the hall.

Ochoa's four-page statement accounted for all the physical findings at the scene and at autopsy. However, it was obvious that Marino's version fit the observed facts exactly, whereas Ochoa's version was strained and contorted. The conclusion was obvious: all the facts in Ochoa's detailed statement came from the two detectives. Convinced of their righteousness, they jettisoned interrogation protocol and were, at least, reckless with the truth.

During debriefing with prosecutors Ochoa has maintained that he signed the false statements, pled guilty in exchange for a life sentence, and testified against his friend at trial because the senior detective threatened him with the death penalty and told him he would be "fresh meat" for other inmates. He says that he reasserted his guilt while in prison because he did not trust the officers and was worried that recanting guilt would cause him harm with prison officials. According to Ochoa, he was just going to serve his time and get it

over with.

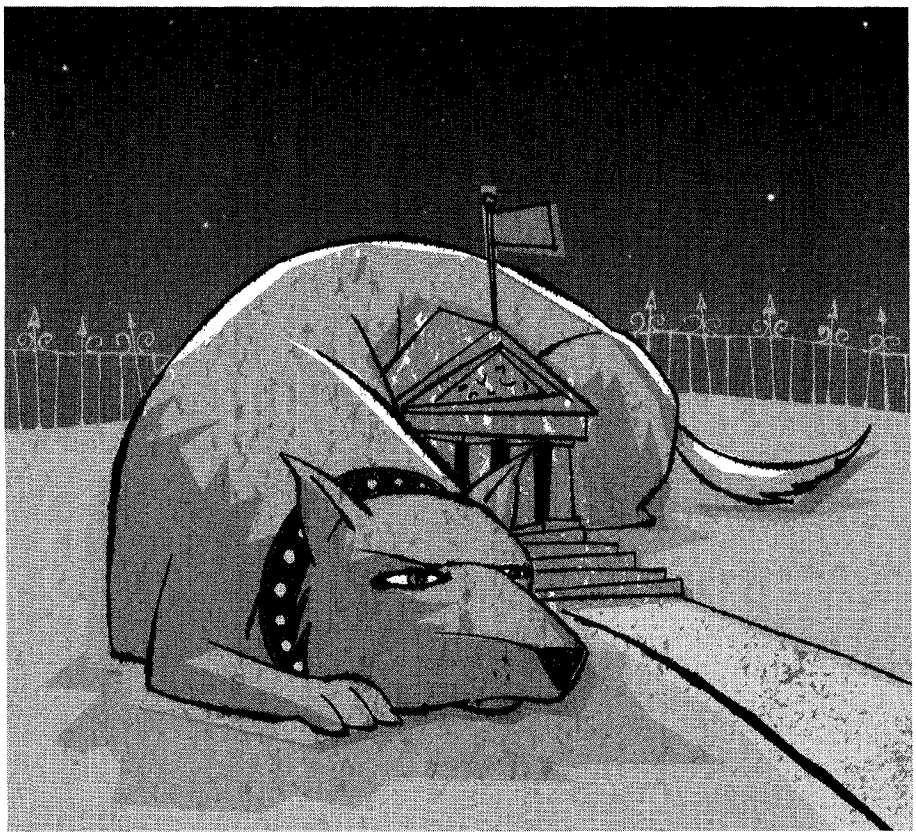
However incomprehensible Ochoa's actions were, the fact remains that he falsely implicated himself and Danziger. Ochoa is now out of prison but, in a sense, Danziger never will be. He suffered a serious head injury when another inmate kicked him with steel-toed boots, forever robbing him of his freedom.

Policy implications

These cases raise important policy questions that go to the heart of the adversary system of justice. Though timeless, such issues are especially relevant today both because of lately documented shortcomings in the criminal justice system and because of the current threat to our cherished civil liberties presented by the response to terrorism.

One such shortcoming is the fact that in many states the vehicle for raising claims of actual innocence, the writ of habeas corpus, is burdened by unfavorable procedural rules. Fortunately, Texas' habeas corpus process allowed resolution of the above cases. However, some habeas rules need to be modified in order to increase the effectiveness of the writ as a means of presenting these claims.

Another issue is the role of the prosecutor in exoneration cases, particularly in light of the duty to see that justice is done, a template for the legal mandate of the prosecutor. Texas law states: "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." Former Travis County District Attorney Robert O. Smith referred to this mandate as "...[Q]uite paradoxical. On the one hand, it casts the prosecutor in the role as an advocate representing the people in an adversary proceeding, and on the other hand it restricts his function as an advocate; in effect, it says that the accused is one of the people whom he is to represent."



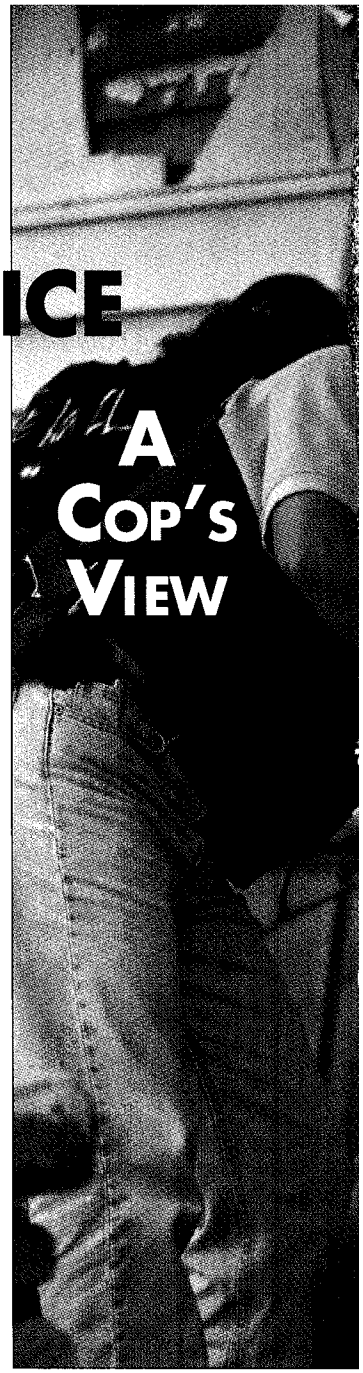
Prosecutors have been reluctant to re-examine cases thought to be over and done with, preferring to let sleeping dogs lie.

Prosecutors have been understandably reluctant to re-examine cases once thought to be over and done with. Cases in which the evidence proves the defendant's guilt beyond a reasonable doubt are difficult to put together, harder to hold together, and happily left behind once a conviction is obtained. The ongoing onslaught of current cases and opposition from victims certain of the identity of the perpetrator add to the pressure to let sleeping dogs lie. But perhaps the greatest hesitancy is the fear-based assumption that the public is intolerant of mistakes and unforgiving of those who admit to them.

These three cases boomeranged into the public's consciousness during a hard-fought district attorney's race. The public reaction was that this was too simple to talk about; mistakes had been made and they needed to be set right. Ronnie Earle readily confessed to astonishment at the public reaction, having been convinced that mistakes of such horrendous moment as convictions of innocent men would result in his being thrown ignominiously out of office. Acknowledgement and remedy seemed to matter to the public more than the game of Gotcha often played out on political fields.

What happened to Lavernia, Ochoa, and Danziger devastated their lives and the lives of their families. It also had an effect on the community of Austin, known for its tradition of respect for the civil liberties of the accused and its ethos of freedom, diversity, and creativity. Prosecutors had thought that the sun would come up in the West before an innocent person would have been convicted of a crime in their jurisdiction. They were wrong.

MISCARRIAGE OF JUSTICE



A COP'S VIEW

Though few officers would intentionally frame a suspect, there are numerous factors in an investigation that can lead to mistakes and erroneous convictions.

BY ROBERT K. OLSON

Most cops I've known over the last 36 years would never knowingly present a case to a prosecutor if the officer knew in his or her heart-of-hearts that the suspect was innocent. However, complexities can cloud those heart-of-heart feelings and contribute to what ultimately are serious mistakes. Investigating detectives are influenced by many factors (often beyond their control) as they pursue the process of finding the perpetrator. Several factors alone, or more likely in combination, can lead to erroneous convictions. This essay will discuss several of those factors.

Concept of innocence

Cops don't necessarily look at criminal cases in a precise, legal sense. They often feel that regardless of the exclusionary rule and other perceived loopholes in the criminal justice system, "guilt is guilt" and the offender either "did it" or "did not." Hence, even in cases where the legal system failed to convict, or "kicked them loose" in police jargon, this would not mean total innocence in the eyes of a detective. Additionally, if a conviction is later overturned by appellate courts, a detective would not readily concede that the party was innocent of the crime. Arguments about the degree of culpability are not relevant to innocence in the police perception. The detective wants to know whether the suspect committed a criminal act or not.

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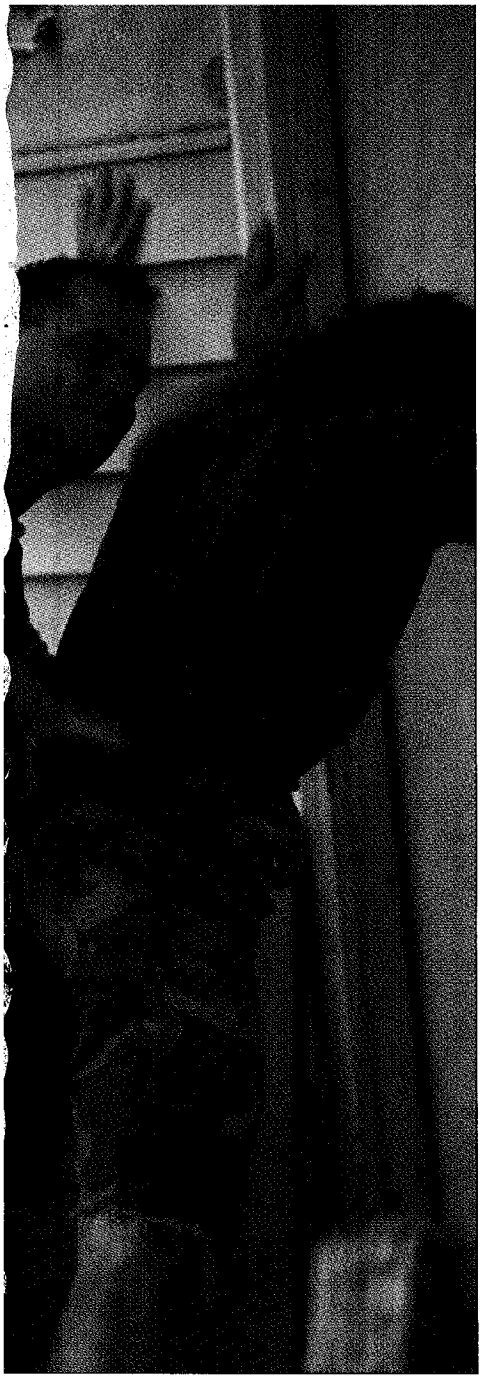
Pressure to solve cases

In most police departments, detectives are grossly overworked, consequently they simply cannot follow all promising leads. They must make quick decisions about priorities and can generally follow-up only those leads that appear to be the hottest. They look for obvious evidence at the scene, but also review who has motive, who had the ability, etc. As they follow these leads, if one becomes more promising than another they will continue down that vein first.

Many times this is perceived as proving the suspect guilty, even though the investigator feels that there is substantial substantive information that makes the lead look so promising. It would be naïve not to say that the investigating officers should and do focus their resources in that direction. This is where good case supervision comes into play, in



MIKAEL KARLSSON

that the supervisor can monitor those investigations and look for information that might lead to a different suspect, or clear the current one.

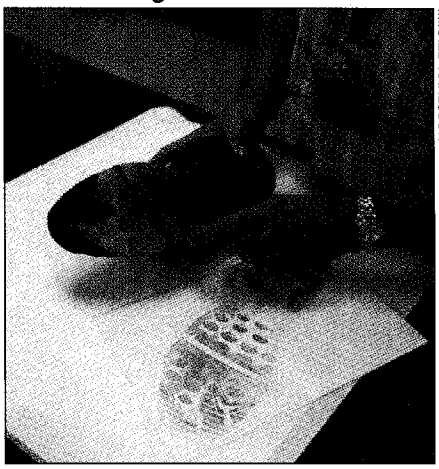
Truth

All investigative officers, as well as other criminal justice system personnel, have to deal with the problem of lying, exaggerating, or well intended but mistaken witnesses. This is where the training of detectives in interrogation and interview techniques is critical. Some states and cities have the ability to polygraph witnesses to help the detective make an assessment as to the veracity of information, but many do not. Again, this is where good detective unit supervision can help identify where exaggerating witnesses may well be taking an unsuspecting detective down a primrose path toward a specific and potentially innocent suspect. Prosecutors also share in this problem, as they must evaluate the statements given to the detectives when they make their charging decisions.

Poor forensic work

Investigating police officers often pursue leads with the help of other professionals. If those other professionals make a mistake, the officer is working under an illusion about the potential utility of factors that may point to the guilt of a given suspect. This poor forensic work can also influence a detective's investigative strategy and be a significant piece of information counted on by the detective as he or she pursues a specific suspect over and above other potential suspects who may be erroneously eliminated. A clear example of shoddy forensic work is the many cases involving the work of Oklahoma City police chemist Joyce Gilchrist, who was discovered to have provided inaccurate and false data. As a result of the publicity on this case, more and more defendants are questioning the forensic work done on their cases.

Poor forensic work can influence a detective's investigation.



MIKAEL KARLSSON

Poorly trained investigators

There is probably no greater opportunity for a wrongful conviction to occur ultimately than in the initial investigation by a poorly trained or recalcitrant investigator. Over the last 30 years, law enforcement has developed significant training enhancements in this area that are accepted by the courts and routinely used across the nation. Our department sends all of our investigators to the Reid School of Interrogation to develop their skills. We also provide ongoing in-service training, including assistance from local county and federal prosecutors. The determination

of innocence often hinges on evidence not collected and leads not followed up.

Poor defense

In some cases, the defense probably has a significant impact on miscarriage of justice convictions. Some defense attorneys, particularly those who are employed at public expense, may not always do the quality job of reinvestigation and cross examination one might find with a well-paid private attorney. The poor work done by these advocates can lead to an erroneous conviction. If one takes all of the potential sources of error in the police and prosecution portions of the investigation and adds them to a poorly trained or recalcitrant defense attorney, nothing but bad justice can result.

Defense attorneys are a final check on the work of police and prosecutors. If they are lazy or not trained correctly, they will not critically evaluate the quality of the evidence provided by the prosecution and the police. Like the requirements for a good supervisory investigative supervisor, the same is needed to ensure that we have zealous advocates for defendants, particularly those employed at public expense.

Over zealous prosecution

Some of the same issues involving investigators also affect prosecuting attorneys. It is not uncommon for detectives to submit a case and then have the prosecutor identify three or four additional issues that they need investigated in order to charge the case in the way they would like. These issues go back to the detective and the detective only works on those specific issues, helping the prosecutor prove the suspect guilty, not trying to determine whether additional information might identify a different suspect.

Prosecutors who receive cases from detectives have some obligation to review that evidence with a critical eye, and besides looking for specific things to prove the subject guilty in court, they should review those cases to have additional investigation done to reasonably ensure that all possible suspects have been identified. They should draw on the experience of the supervising detective when charging decisions are not clear.

Suspect is a bad guy

Many chronic offenders, for a variety of reasons, can become easy targets for a miscarriage of justice. Their lifestyle and previous criminal history easily confirm personal feelings about guilt or innocence. There are many, many horror stories around law enforcement circles about suspects who have done illegal things and plead guilty to something they didn't do in order to avoid a more serious charge, and/or to do less time. This type of defendant feeds the attitude of not just the police, but zealous prosecutors and poor defense attorneys as well.

The differing concepts of innocence mentioned earlier, and attitudes and feelings about chronic offenders, are likely to rise in particularly serious crimes where there are multiple perpetrators. In the eyes of a detective, whether or not one of three stick-up men is the trigger puller really matters very little; they are all guilty of involvement in the death of the victim since they conspired to do the robbery. This is particularly evident in cases where all of the perpetrators have records of prior violence.

Victim identification

Over the years, it has become clearer and clearer to me that there are far more extensive problems with accurate identification by victims then one might think. People, after all, are human and generally the encounter between victims and perpetrators is brief and traumatic. Unless the victim previously knew or recognized the suspect, reliable identifications can be difficult, particularly as the time frame from the actual crime to the suspect identification lengthens. Detail as to the specific amount of time the suspect was seen, the distance between them, the light, etc. must be established. Most identifications are bolstered by corroborating evidence such as fingerprints and ballistics, but many rape, robbery, and murder cases often rely almost solely on an eyewitness.

The problem of drugs

All of these issues are made more complex when victims and witnesses were under the influence of alcohol or drugs, factors that add to the complexity of identifying what really is and what really did happen. Detectives must adequately describe and make note of the condition of witnesses at the time of the crime. If the condition is not adequately described, the witness statement as transcribed becomes words on paper that come back in the frame of mind and context of the reader. This can give a false sense of the assuredness of the witness, whereas if you listen to the witness in person you would have reservations about his or her accuracy or veracity.

Intentional framing

In my experience the occurrence of a person being intentionally framed by an unscrupulous investigator is very rare. Yet as the 1999 Ramparts scandal in Los Angeles, and other inci-

dents, have shown, these things certainly can occur. The Los Angeles Police Department scandal was sparked when a police officer was arrested for stealing cocaine from a police evidence room. The officer ultimately implicated other officers for various forms of misconduct and to date more than 100 criminal convictions have been overturned. The officer was given a two-year term and federal prosecution on this case.

This goes back to the previously mentioned need for experienced detective supervisors to review cases and ensure that there are additional opinions about evidence collection and its interpretation, particularly as they relate to serious crimes that have significant sentences, and especially if the suspect is really a bad guy anyway. This includes supervisors monitoring court cases for reasons of dismissal or reasons of prosecutorial declination—how many, why were they declined or acquitted—and tracking that kind of information to establish some benchmarks for review of investigator performance.

The determination of innocence often hinges on evidence not collected and leads not followed up.

Ensuring justice

From the police perspective, the best way to reduce the opportunity for a miscarriage of justice is to upgrade and enhance the training and experience of the detectives continually. We should institutionalize within our organizations appropriate experienced supervision of detectives and cases, rather than putting all the responsibility on the back of the investigator. These supervisors should also be closely aligned with the prosecutorial team so that they can work in tandem as a check and balance on these usually serious cases.

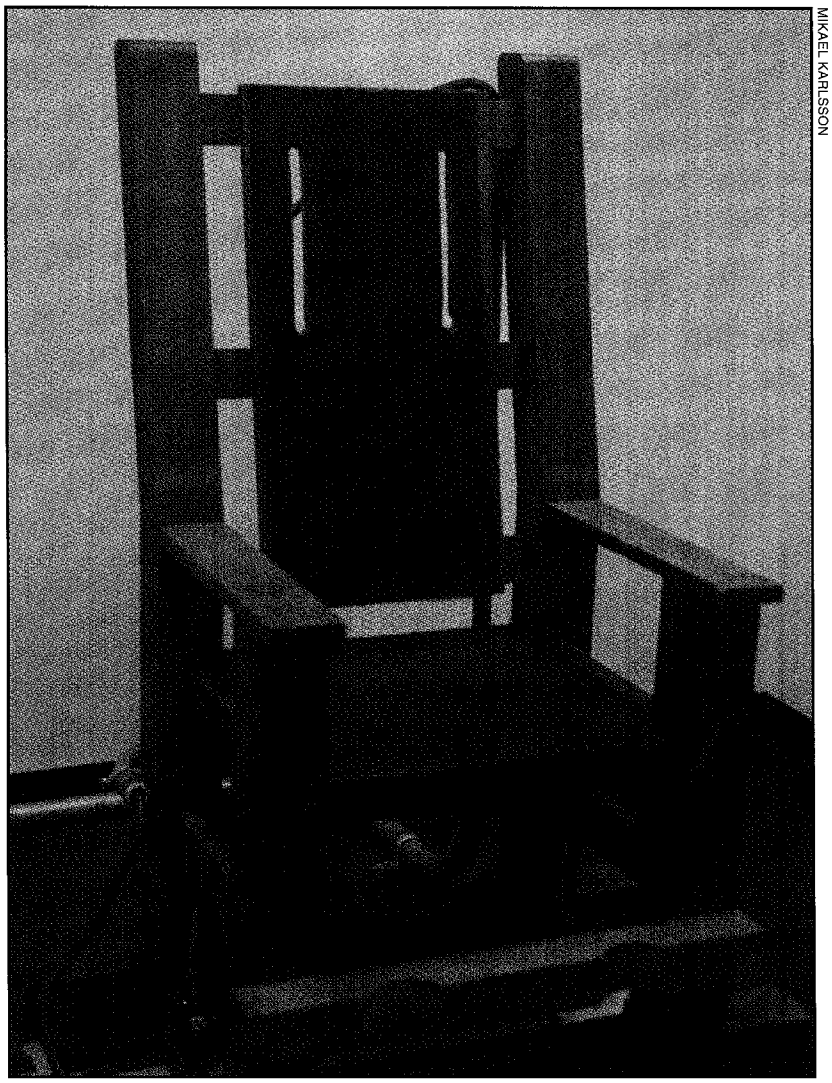
The Public Defender's office should also be a part of this triumvirate of checks and balances. They should do so not necessarily in the traditional adversarial relationship (which too often keeps defense attorney's from coming forward to prosecutorial or investigative supervisors with pre-trial information that may lead to real justice).

I recognize that there are significant ethical issues here for the defense and prosecution, but they are not for the police. I believe police should establish solid relationships with the Public Defender's office so that when a public defender really believes that his or her client may be innocent, he or she would have another venue in which to present evidence of innocence prior to trial. I'm sure this would look different in many states depending on individual laws, but I believe such a system could be developed so that everyone would be working together for the common goal of ensuring that justice is served, not the traditional win/lose result of formal adjudication.

MIKAEL KARLSSON

Rates of Reversible Error and the Risk of Wrongful Execution

A method developed by a multidisciplinary team at Columbia indicates that there is a substantial risk of innocent fatalities in the operation of the death penalty, and reveals a need for ongoing risk assessment in the process of administering the penalty.



MIKAEL KARLSSON

BY JAMES S. LIEBMAN

Innocent fatalities are a concern of all social activity with a capacity to kill. This is especially true when the social activity is the death penalty since an innocent person's execution is not simply a tragic collateral consequence of activity with a non-fatal objective. Instead, the taking of life is the *goal* of the enterprise, and the killing is the *intended* act of the state.

There is another difference between accidental fatalities in other social activities and those that occur when the capital system miscarries. Typically, the former fatalities are easy to spot and quantify; the latter are not. Precisely because operating a railroad is not designed to kill, the fact that passengers died when a train went off the rails is conclusive proof that a serious mistake occurred. When the number of victims is determined—usually without too much difficulty—the extent of the tragedy is clear. All that remains is to figure out what went wrong, to compensate the victims' families, and to take steps to keep the fatal error from occurring again.

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But when the state executes even hundreds of people, those deaths provide no convincing evidence that the system did or did not miscarry or that innocent people did or did not die. This is principally because the execution of the innocent is notoriously difficult to prove.

Once an execution for murder occurs (all American executions are for murder), both the victim of the offense and the person convicted of committing it are dead. The most important sources of information are unavailable. Nor (surprisingly to most lay persons) do appellate and post-conviction decisions directly shed light on the subject. Those proceedings typically do not address the question of guilt or innocence but, instead, the sufficiency of the evi-

dence (an eyewitness identification will always suffice, though the risk of error may be very high) and the legality of the procedures used to determine guilt and sentence. As a result, it is not infrequently the case that a man or woman will be *legally* and *procedurally* approved by the courts for execution despite serious *factual* questions about his or her *substantive* guilt.[1]

Nor is there any systematic effort to determine whether executed individuals were innocent—even where guilt was not at all clear. Although it would be unthinkable for a train wreck in which people may have died to pass without a meticulous effort to find innocent victims, there is no effort at all to distinguish the innocent executed from the guilty. It is, to begin with, a first principle of triage among understaffed capital defense lawyers to let the state bury the executed, regardless of doubts about their guilt, and to attend to the thousands of condemned who are still alive. Unlike Canada and Great Britain, no American jurisdiction provides for formal inquests into potential miscarriages once appellate proceedings have ended.[2]

Even more troubling, in my opinion, the states' attorneys with custody over the best evidence of the guilt or innocence of the executed—the confidential file in the case that may, for example, include potentially conclusive biological evidence of the identity of the killer—have almost all refused to release the evidence. Recently, in fact, prosecutors have enlisted the assistance of state legislatures and courts to require the *destruction* of this best evidence of the guilt or innocence of executed individuals for the stated reason that, if DNA tests on evidence in the state's confidential file invalidated a verdict, "it would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man."[3]

Indicative of the difficulty of proving that an executed person is innocent, and of the high burden of proof that applies, is an exchange between Bedau and Radelet and Markman and Cassell.[4] Bedau and Radelet marshaled strong evidence that American jurisdictions have executed a number of innocent individuals. In response, Markman and Cassell declared a stalemate based on the burden of proof. Without saying that *they* had proven, even by a preponderance of the evidence, that the executed individuals were guilty, Markman and Cassell argued that since judicial determinations of guilt preceded each execution, Bedau and Radelet bore the burden of proving the defendant's innocence beyond *any* doubt, then pronounced the burden unmet because the historical record was imperfect.

Another peculiarity of the capital context is the reaction to this stalemate, which is resignation rather than precautionary risk analysis. Even though the number of fatalities from the errant operation of railways, the unsafe packing of meat, or inadequate security inspections at airports can be, and are, documented, it would be the height of irresponsibility to await conclusive proof of past fatalities before taking determined steps to assess and diminish the risk that deaths will occur in the future. Amtrak, Hormel, and the FAA simply have no immunity from safety concerns on the ground that "no one has died yet, and until we're sure someone has, we don't have to assess the reliability *in fact* of activities we have designed *in theory* to provide safe travel and hamburgers." Post-accident body counts and resulting inquests are always complemented—and in the best of worlds are avoided entirely—by efforts to assess and lower the risk of flaws that could kill innocent people in the future.

Until now, however, criminal justice officials have declined to accept any similar responsibility to systematically assess and diminish the risk of flaws and innocent fatalities in the operation of the death penalty. Their view has been precisely that until we are 100 percent sure that innocent people have been executed, there is no reason to assess the reliability *in fact* of procedures that have been designed *in theory* to make accurate decisions about who deserves to die.[5]

Evidence of the risk

This is not because there is no evidence of a risk of innocent fatalities in the operation of the death penalty. In addition to the troubling cases identified by Bedau and Radelet, consider that 101 individuals sentenced to die during the modern death-sentencing era have subsequently been acquitted of the capital offense and released, including dozens about whom there is no doubt that they were innocent.[6] Moreover, many of these individuals were *approved* for execution by reviewing courts, leaving the discovery of their innocence to entirely unpredictable fortuities—a film makers' doggedness in one case, a college journalism project in another, a burglary of a prosecutor's office in a third case, and a posthumous DNA analysis (after, and because, the inmate had died of cancer while awaiting execution) in a fourth case.[7]

1. *See, e.g., Herrera v. Collins*, 506 U.S. 390 (1993); *Wiggins v. Corcoran*, 288 F.3d 629, 643 (2002) (Wilkinson, C.J., concurring). *See generally* Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771 (2000).

2. *See* Lockyer, "Guilt Revisited: A Comparative Perspective on Canada, the United Kingdom and the United States," talk delivered at DNA and Human Rights: An International Conference, University of California, Berkeley (April 27, 2001).

3. Enzinna, *Afraid of a Shadow of a Doubt* (Oped), Wash. Post, May 7, 2000, at B8. *See* Masters, *Va. Evidence Destroyed Despite Warnings to Clerk*, Wash. Post, Oct. 18, 2001, at B3. Bradley, *DNA Testing in Crime Cases Causing Distrust in Criminal Justice System*, NPR Morning Edition, Aug. 29, 2000, transcript available at 2000 WL 21481402; Farrell, *DNA Scrutiny Tests Judicial System*, Boston Globe, June 26, 2001, at A1; Green, *DNA Tests Not Likely After an Execution: Virginia Opposing Third Request of its Kind*, Richmond Times-Dispatch, March 26, 2001, at A1.

4. Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Markman and Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); Bedau and Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

5. *See, e.g.*, Statement of William G. Otis before the Committee on the Judiciary, United States Senate, Concerning "Protecting the Innocent: Proposals to Reform the Death Penalty," June 18, 2002.

6. *See United States v. Quinones*, No. S3 00 Cr. 761 (JSR) (July 1, 2002), at 21-22 & n.11 (listing relevant cases).

7. *See, e.g.*, Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2048-51 n.84 (2000) (collecting sources).

DNA is itself a fortuity. The flaws it reveals are potentially characteristic of *all* criminal cases—mistaken eyewitness identifications, perjury by jailhouse informants, incompetent defense lawyering, and prosecutorial suppression of evidence. But DNA can make these flaws apparent in only the small proportion of cases that fortuitously have biological evidence to test.

Additional circumstantial evidence of the capital system's inability to generate confidence in the accuracy of its outcomes is the *lack* of confidence that capital prosecutors typically display when asked to permit DNA testing to confirm or disprove the guilt of executed individuals. Prosecutors are well placed to estimate the accuracy of verdicts they obtain that subsequently were carried out. The fact that they usually refuse to permit tests that, at no fiscal cost to the state, could categorically confirm the reliability of their work *if it was reliable* is explicable only if they have some reason to worry that their work was not reliable.

Evidence of this sort recently led Supreme Court Justice Sandra Day O'Connor to acknowledge "'serious questions about whether the death penalty is being fairly administered in the United States." In a speech last summer, Justice O'Connor—who voted to reinstate the death penalty in Arizona in 1973 when she was a leader of the state legislature, and who has approved numerous executions while on the bench—stated that "'[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed.'"[8] A year to the day later, United States District Judge Jed S. Rakoff, a former federal prosecutor with a reputation as a conservative on criminal justice issues, reached a similar conclusion:

> [T]he best available evidence indicates that . . . innocent people are sentenced to death with materially greater frequency than was previously supposed and that . . . convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence.[9]

Despite this evidence, no American jurisdiction has a method for assessing the risk of flaws in its death penalty system with potentially fatal consequences for innocent defendants. The kernel of such a method has been developed, however, by a multidisciplinary team of Columbia researchers, of which I am a member.[10]

Assessing the risk

To see the logic of our approach, consider that most social activity includes a method for inspecting the reliability of products and services, with *two* important goals. One goal is to keep *each* flawed product or service from harming anyone by getting it out of circulation while the flaw is cured or the item is scrapped. A second goal is to analyze the frequency and pattern of *all* flaws in order to assess the risk of future harm and devise prophylactic measures. Inspections thus may reveal systemic problems (*e.g.*, poor management or oversight) that are associated both with a high rate of modest flaws (*e.g*, blemishes in paint jobs and grinding transmissions) and with rare but serious accidents (*e.g.*, fatalities when steering wheels disengage). Evidence of the former problems then can be used to signal the need for remedial steps before the latter tragedy occurs.[11]

The capital system also uses inspections—appeals and post-conviction review—but only for the *first* of these purposes. The sole reason for identifying flaws is to remove the *particular* verdict from circulation and require it to be retried or replaced with a lesser outcome. Reviewing courts almost never consider whether the reversible error is part of a pattern of flaws in cases involving, for example, the same trial judge, prosecutor, defense lawyer, type of evidence, theory of liability, or procedure. Nor do reviewing courts even keep track of capital verdicts' overall rates of success or failure on appeal. Far less do they publish the results of such inquiries so the relevant actors, disciplinary officials, the press and the public can take warranted adulatory or remedial steps. And no significance of any sort is attached to the largest category of errors—those that are recognized but ruled non-reversible because they are harmless, nonprejudicial, or waived. No account thus is taken of the insight from other contexts that patterns of even minor errors can signal the need for remedial action to lower the risk of potentially tragic flaws.

A systematic analysis

Based on a retrospective study of the sort that other activities embed in their routine inspection and risk-assessment procedures, our Columbia University team concluded that information of great value to the relevant actors, regulators, and the public can be extracted from a systematic analysis of the results of capital appeals. Chief among that information is important evidence that the risk of executing the innocent is well above the "extremely" low level that is widely acknowledged to be necessary if the death penalty's integrity and penological value is to be maintained.[12]

Our study reviewed the outcomes on judicial review of the more than 5,800 death verdicts that were imposed by the 34 active death-sentencing states and 1,004 active death-sentencing counties between 1973 and 1995. During that period, more than 4,500 of the verdicts were finally reviewed on direct appeal, of which 41 percent had reversible flaws. An additional 10 percent of the verdicts that survived direct review were reversed on state post-conviction review. And

8. AP, *O'Connor Questions Death Penalty*, New York Times, July 4, 2001, at 9.

9. *United States v. Quinones*, *supra* n. 6, at 2, 21.

10. My colleagues, to whom I am indebted for much of the analysis in this piece, are Jeffrey Fagan, Andrew Gelman, Valerie West, Alexander Kiss, and Garth Davies.

11. *See, e.g.*, Abernathy, et al., A STITCH IN TIME: LEAN RETAILING AND THE TRANSFORMATION OF MANUFACTURING—LESSONS FROM THE APPAREL AND TEXTILE INDUSTRIES (New York, N.Y.: Oxford University Press, 1999).

12. *See, e.g.*, Markman and Cassell, *supra* n. 4, at 159.

"The fully foreseeable execution of numerous innocent persons"

an excerpt from *U.S. v. Quinones*

United States of America v. Alan Quinones, et al.
S3 00 Cr. 761 (JSR)
United States District of New York, July 1, 2002

NOTE: In this opinion, U.S. District Judge Jed S. Rakoff found the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598 to be unconstitutional. Earlier, Judge Rakoff had declared his tentative decision to do so in *United States v. Quinones*, 196 F.Supp 2d 416 (S.D.N.Y. 2002). Below are some excerpts from the July 1, 2002 decision (footnotes omitted):

–Michael Radelet

[T]he best available evidence indicates that...innocent people are sentenced to death with materially greater frequency than was previously supposed and that... convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would be able to prove their innocence. It follows that implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process [*2]. ...

Regarding the DNA testing that has exonerated at least 12 death row inmates since 1993 ... the Government argues that, since such testing is now available prior to trial in many cases, its effect, going forward, will actually be to reduce the risk of mistaken convictions. Govt. Mem. 25-26. This completely misses the point. What DNA testing has proved, beyond cavil, is the remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases. In each of the 12 cases of DNA-exoneration of death row inmates referenced in Quinones, the defendant had been found guilty by a unanimous jury that concluded there was proof of his guilt beyond a reasonable doubt; and in each of the 12 cases the conviction had been affirmed on appeal, and collateral challenges rejected, by numerous courts that had carefully scrutinized [*23] the evidence and the manner of conviction. Yet, for all this alleged "due process," the result, in each and every one of these cases, was the conviction of an innocent person who, because of the death penalty, would shortly have been executed (-some came within days of being so-) were it not for the fortuitous development of a new scientific technique that happened to be applicable to their particular cases.

DNA testing may help prevent some such near-tragedies in the future; but it can only be used in that minority of cases involving recoverable, and relevant, DNA samples. Other scientific techniques may also emerge in the future that will likewise expose past mistakes and help prevent future ones, and in still other cases exoneration may be the result of less scientific and more case-specific developments, such as witness recantations or discovery of new evidence. But there is no way to know whether such exoneration will come prior to (or during) trial or, conversely, long after conviction. What is certain is that, for the foreseeable future, traditional trial methods and appellate review will not prevent the conviction of numerous innocent people. [*24]

Where proof of innocence is developed long after both the trial and the direct appeal are concluded, it is entirely appropriate that the defendant make a truly persuasive showing of innocence, as Herrera requires, before his case can be reopened. But given what DNA testing has exposed about the unreliability of the primary techniques developed by our system for the ascertainment of guilt, it is quite something else to arbitrarily eliminate, through execution, any possibility of exoneration after a certain point in time. The result can only be the [*25] fully foreseeable execution of numerous innocent persons.

13. 47 = 41 reversed on direct review + 6 reversed on state post-conviction review (.10 x the 59 that survived direct review).

14. 68 = 47 reversed by the state courts + 21 reversed by federal courts (.40 x the 53 that survived state court review). *See* Liebman, Fagan, Gelman, West, Kiss and Davies, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, http://www.law.columbia.edu/brokensystem2/ (Feb. 11, 2002), at 9, 19.

41 percent of the death verdicts that survived state court review and were fully inspected by federal courts were overturned. The upshot of this 23-year track record is that, for any given 100 fully reviewed verdicts, an average of 47 were reversed by the state courts,[13] and 68 of the 100 were reversed by either the state or federal courts.[14]

Indicating that these high reversal rates reflect badly on the accuracy of most capital verdicts are the following findings: (1) Verdicts with re-

versible flaws were more than twice as common as verdicts without such flaws. (2) Rates of reversible error were greater than 50 percent in 20 of the 23 study years and in 29 of the 34 study states. (3) Flaws usually are reversible only if they are shown to have a—or, often, a *strong*—capacity to change the outcome. (4) The decision makers who apply these standards and find so much reversible error have strong political incentives to *approve* capital verdicts absent clear flaws with a demonstrable capacity to skew the outcome. Ninety percent of the reversals were by judges subject to electoral discipline in jurisdictions with strong public support for the death penalty. More than half of the remaining reversals were by judges appointed by Republican presidents with strong law-and-order agendas. (5) At the (state post-conviction and federal habeas) review stages where we collected data, more than 75 percent of the reversals were for violations that greatly compromise the reliability of the outcome (egregiously incompetent lawyering, prosecutorial suppression of evidence of innocence or mitigation, faulty jury instructions, and biased judges or jurors). (6) And at the (state post-conviction) stage where we collected data, 82 percent of the retrials necessitated by reversals resulted in a different outcome after the error was cured, including 9 percent that ended in acquittals.[15]

Multiple regression analyses identify states, counties, and cases where the risk of capital error is especially high. (1) The more often states and counties use the death penalty per 1,000 homicides, the higher their capital error rates, and (for counties) the higher their rates of convicting people who are not guilty. (2) Among the strongest predictors of higher reversal rates are political pressures to use the death penalty not as a punishment for only the worst of the worst, but instead as a generalized response to fears about crime. High error rates thus are associated with ineffective crime-fighting policies (low rates of apprehending and punishing serious criminals); frequent interactions between affluent white residents and African-Americans and welfare recipients; and high rates of homicide victimization in the white as compared to the black community. (3) States that require judges to stand for election frequently in contested races have higher capital error rates on direct appeal and federal habeas than states where judges face less or no electoral pressure. (4) States that spend less money on their court systems have higher capital error rates on direct appeal than states that provide average or better funding for their courts. Overall, Alabama, Arizona, Florida, Georgia, and Texas appear to have the highest overall risk of serious error. Colorado and Connecticut appear to have the lowest risk.[16]

Additional findings indicate a substantial risk that even the most serious of errors—including conviction of the innocent—will escape detection by existing capital review procedures. (1) More than 60 percent of the 101 people released from death row since 1973 because they were not guilty were initially approved for execution by one, two, or even a full complement of three levels of judicial review. (2) Case studies of innocent individuals who were approved for execution by all three levels of court review reveal a strong propensity on the part of state and federal judges to identify the errors that in retrospect are known to have led an innocent person to be convicted and condemned, but to affirm verdicts nonetheless on the ground that the errors were "harmless," non-prejudicial or waived. (3) The 41 percent-10 percent-40 percent pattern of reversal rates at the three successive review stages does not exhibit the sharply downward trend of remaining flaws, dwindling to nearly zero, that one expects in a fully effective progression of inspections. (4) Multiple regression analyses reveal that, everything else equal, prisoners lucky enough to be represented by highly paid lawyers from well-staffed big-city law firms are almost 70 percent more likely to obtain federal relief than are the majority of prisoners with less well-paid lawyers from more poorly staffed offices.[17] (5) Outcomes of capital appeals appear to be affected by how politically controversial it is to reverse the verdicts, regardless of how flawed they may be.[18]

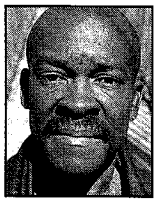
Limiting the risk

These findings prompted us to identify reforms for limiting the risk of capital error and execution of the innocent.[19] Four additional conclusions are especially pertinate to this symposium. First, the obstacles that keep policy makers from directly measuring the frequency with which innocent people are executed should not keep them from systematically assessing the *risk* of such tragedies using all available evidence. This is especially so because the obstacles either are unavoidable or are imposed by officials with an incentive to obscure potential mistakes.

Second, all participants in the death penalty system should be under a strong obligation to make public all evidence in their control about the reliability of their operations. Third, the amount and pattern of reversible error provides important evidence of the risk of unreliability in capital verdicts. Appellate and post-conviction courts, justice officials, and state and local commissions should make it their business to study those patterns and to share the results with the relevant actors and the public. Finally, our initial study of those patterns of serious capital error indicates that the risk of executing the innocent is too high for comfort.

15. *Id* at 11-81.
16. *Id.* at 337-390.
17. *See id.* at 376-386.
18. For example, after controlling for other factors, state court reversal rates decrease if the verdict is from a rural community (where the smaller number of such verdicts make the reversal of any one of them more controversial than in urban communities) or the reviewing court has a large, potentially controversial backlog of capital verdicts awaiting inspection. *See id.* at 194, 218-219, 333-334, 354-356, 367-369.
19. *See id.* at 391-421.


Do exonerations prove that "the system works?"



A review of the cases of 13 men sentenced to death in Illinois shows that in only three of them can one possibly conclude that the convictions were reversed in the normal course of appellate review

By Lawrence C. Marshall

The facts are well known. Since 1977 when the death penalty was re-instituted in Illinois, 12 men have been executed. Yet, during that same period, 13 men who had been sentenced to death have been exonerated. These figures set off a furor in Illinois. In January 2000, Republican Governor George Ryan, who spent his legislative career advocating expansion of the death penalty, looked at these cases and declared the nation's first modern moratorium on executions. The commission he appointed to study capital punishment in Illinois recently proposed 85 reforms—many of them far-reaching.[1] The commission warned, though, that even were all these reforms to be enacted, administration of the death penalty would still retain the very real risk of executing the innocent.[2] Now, as the Governor prepares to leave office at the end of 2002, there is much talk about the possibility of his commuting the sentences of many or all of the 160 condemned inmates who were sentenced under a system that has been condemned as flawed—inmates who did not have the benefit of the reforms that the governor's commission has identified as critical.[3]

Throughout the country, legislators and activists have been debating the implications of the Illinois experience. According to some, the flaws in the Illinois system are not unique, and all of the vices that have been exposed apply with equal force to other states. Indeed, the Death Penalty Information Center lists 101 cases of

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Many thanks to Rob Warden for his help in preparing this article. For purposes of full disclosure, it should be noted that, at one point or another, the author has represented the following individuals whose cases are discussed in this essay: Rolando Cruz, Gary Gauger, Ronald Jones, Carl Lawson, Anthony Porter, Darby Tillis and Dennis Williams. This article is dedicated to the memory of Richard Cunningham, whose passion for justice continues to inspire.

1. *See* Report of the Governor's Commission on Capital Punishment, April 2002, at http://www.idoc.state.il.us/ccp/ccp/reports/commission_reports.html.

2. *Id.*

3. *See* Mills, *Clemency Push for All 160 On Death Row; Lawyers Group Pins Hope in Ryan's Vow to Consider Cases,* Chicago Tribune, May 16, 2002, at 1; Frammolino, *Ryan Weighs Clemency for All on Illinois Death Row,* Los Angeles Times, March 5, 2002, at 8; Long and Mills, *Ryan to Review Death Row Cases; Governor May Commute Terms,* CHICAGO TRIBUNE, March 3, 2002, at 1.

once-condemned defendants who have been exonerated during the past 30 years.[4] Although the national ratio of executions to exonerations (800 executions to 101 exonerations) is a bit less dramatic than the Illinois ratio, it is nonetheless startling that there are 101 instances nationally where one who was convicted beyond a reasonable doubt, and sentenced to death beyond a reasonable doubt, has later been exonerated.

This evidence about the system's propensity to condemn innocent men and women has, in many ways, changed the nature of the death penalty debate. No longer does the debate focus exclusively on the moral, ethical, and theological issues about the propriety of government imposing the ultimate punishment. Instead, there is an ever growing group of people—such as Governor Ryan—who maintain that regardless of how one feels about capital punishment in theory, the pragmatic realities of a system that sentences innocent people to die require rethinking support for the modern death penalty, at least in the manner that it is currently administered.

Other pragmatic attacks are also lodged against the modern death penalty, including evidence of the system's racism, its arbitrariness, and its disparate impact on the poor. But none of these challenges have stimulated the kind of interest that the wrongful conviction problem has triggered. Indeed, a United States District Court recently struck down the federal death penalty based on the nationwide evidence showing a high risk of condemning the innocent.[5]

A system that works?

Some who support the death penalty as currently administered respond that, far from exposing a system that is broken, these exonerations prove that the current system works exceedingly well at uncovering errors prior to executing innocent defendants. An effective quality-control procedure is in place, they argue, and each exoneration ought to buoy the public's confidence that the death penalty is being administered accurately.[6]

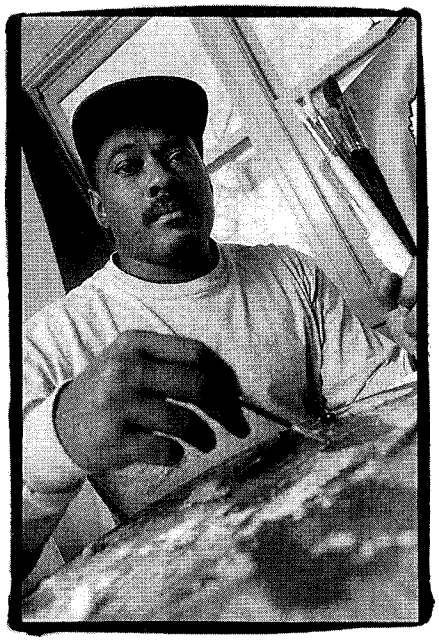
Analyzing these competing claims is of utmost importance, for they lead to diametrically opposite conclusions. If these cases expose a flawed system, then repeal of the death penalty or very significant reform of the capital punishment system would appear to be the only plausible solutions. On the other hand, if these cases reveal how well the system works, then the wrongful conviction phenomenon has no legitimate role to play in attacks on the death penalty.

In order to assess the claim that exonerations prove how well the system works, it is necessary to examine individual cases to determine how these exonerations came about. There is no substitute for facts in this regard. When the debate is about the ethics and morality of capital punishment in the abstract, one can argue based on one's personal view and philosophy. But when the discussion focuses on the pragmatic issue of the system's propensity for error, there can be no meaningful discourse in the absence of facts. Let us, then, look at the 13 Illinois exonerations to determine what light they cast on the question of whether exonerations prove that the system works.

As will be seen, in only three of the Illinois capital exonerations can one possibly conclude that the convictions were reversed in the normal course of appellate review, *i.e,* that the system worked intrinsically without the fortuitous discovery of new evidence. In the other 10 cases, the evidence that led to exoneration came about through fortuities, in ways upon which no system can possibly rely if it is committed to preventing the execution of the innocent.

Where it didn't work

Confessions from the true killers. In seven of the 13 cases, the exoneration came about in whole or in part because the true killer or killers confessed or admitted to the crime for which the innocent defendant had been sentenced to die. These confessions and admissions came about in widely differing ways, but in each case they came about through completely unpredictable events extrinsic to the checks and balances intrinsic to the legal system.



Dennis Williams

In the cases of Dennis Williams and Verneal Jimerson (two of the four involved in the case known as the "Ford Heights Four"), Northwestern University Journalism Professor David Protess and a team of his students tracked down the true killers and, with the help of an investigator, obtained the confessions of three of those who had been involved.[7] The ringleader among the four men who had actually committed the crime, Dennis Johnson, had died several years earlier, a fact that made the other perpetrators more willing to implicate him and admit their own involvement. These confessions emerged 18 years after Williams was

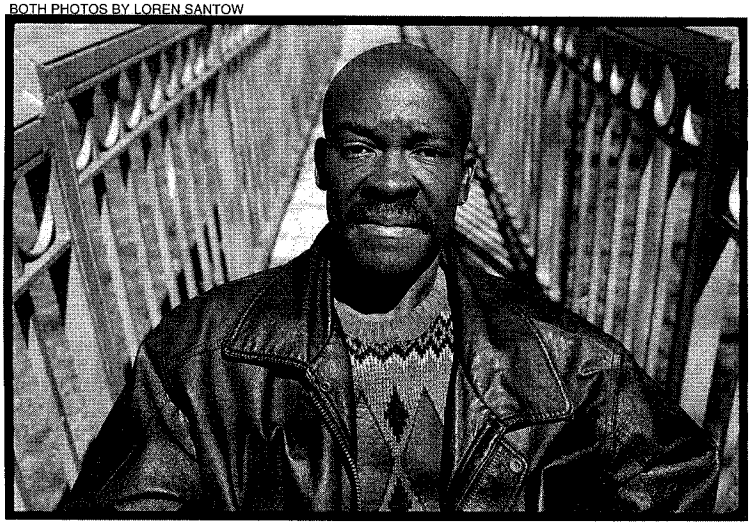
4. *See* http://www.deathpenaltyinfo.org/innoc.html.

5. *United States v. Quinones*, S3 00 Cr. 761 (JSR), July 1, 2002.

6. *See* Rimer, *A Proud and Unwavering Believer in the Death Penalty*, New York Times, Feb. 10, 2001, at 10; Jacoby, *Inmates on Death Row Are More Likely to Walk than Die*, Boston Globe, Nov. 20, 1998, at A15.

7. *See* generally Protess and Warden, A PROMISE OF JUSTICE: THE EIGHTEEN YEAR FIGHT TO SAVE FOUR INNOCENT MEN (Hyperion 1998) (also available at http://www.law.nwu.edu/depts/clinic/wrongful/readings/warden_protess/TOC.htm); *People v. Jimerson*, 166 Ill. 2d 211, 652 N.E.2d 278 (1995); *People v. Williams*, 147 Ill. 2d 173, 588 N.E.2d 983 (1992); *People v.* Jimerson, 127 Ill. 2d 12, 535 N.E.2d 889 (1989); *People v. Williams*, 93 Ill. 2d 309, 444 N.E.2d 136 (1983).

BOTH PHOTOS BY LOREN SANTOW



Verneal Jimerson

first sentenced to death, and 11 years after Jimerson was condemned to die. As it turned out, the information that led the students to the true killers was contained in a police report written just four days after the murders. Yet no police officer, prosecutor, or defense lawyer had followed up on these leads for 18 years.

The fortuities here are obvious. For Williams and Jimerson to be freed a series of events had to fall into place, including the decision of the journalism class to become involved in the case, the ability of the students to locate individuals listed in the police report, the death of the ringleader, and the willingness of three individuals to admit their roles in a double murder.

Northwestern journalism students also played a significant role in securing the confession that led to the exoneration of Anthony Porter.[8] Every possible appeal had been exhausted by Porter's lawyers. His conviction had been affirmed on direct appeal and the United States Supreme Court had denied certiorari. He had then failed in his attempt to secure post-conviction relief, a decision that was affirmed by the Illinois Supreme Court. Porter's efforts to secure federal habeas corpus relief similarly failed in the United States District Court, the United States Court of Appeals for the Seventh Circuit, and the United States Supreme Court, which again denied certiorari. Just two days before Porter's September 22, 1988 scheduled execution, the Illinois Supreme Court granted a stay to assess the claim that Porter was so profoundly retarded that he could not understand what was about to happen to him.

During the ensuing months, while Porter's lawyers prepared for a hearing on his mental acuity, Professor Protess decided to have his journalism class investigate the facts that led to Porter's conviction. Within several weeks, these students and a volunteer private investigator had obtained a recantation from the prosecution's key witness and had secured statements from several witnesses implicating a man named Alstory Simon as the real killer. One of these statements came from Simon's estranged wife, Inez Jackson, who admitted that she was with Simon when he killed the victims over a drug debt, and admitted that she had lied about this to the police during the initial investigation. Armed with this evidence, the investigator confronted Simon who confessed to the murders. Within 24 hours of Simon's confession, Porter was released. A man who spent 16 years in prison, and who had already been fitted for his coffin, was now recognized to be completely innocent. The fortuities that led to this exoneration are many, including the facts that Porter obtained his last-minute stay on grounds unrelated to his innocence, that Professor Protess had the time to take on this particular case, that Alstory Simon had become estranged from Inez Jackson who was now willing to tell the truth, and that Alstory Simon was willing to confess.

In the cases of Rolando Cruz and Alejandro Hernandez, the true killer was apprehended on a rape-murder very similar to the Nicarico rape-murder for which Cruz and Hernandez had been sentenced to die.[9] During the course of plea bargaining over a series of rapes and murders, this man, Brian Dugan, admitted sole responsibility for the Nicarico crimes and offered the authorities highly detailed facts corroborating his account. Even with this admission, and with physical evidence connecting Dugan to the crime, the authorities who had put Cruz and Hernandez on death row refused to accept Dugan's statement and persisted in their contention that Cruz and Hernandez were guilty. Yet, the Dugan statements turned the case into a *cause celebre*, and the efforts of many volunteer lawyers and investigators ultimately led to Cruz's acquittal and the dropping of charges against Hernandez. Far from cases in which the system

8. *See* generally Mills, *Porter Case Had Wrongs at Each Turn*, Chicago Tribune, Feb. 12, 1999, at 1; Belluck, *Convict Freed After 16 Years on Death Row*, New York Times, Feb. 6, 1999, at 7; Holt and Mills, *Double Murder Case Unravels; Once Two Days From Execution, Inmate May Go Free After Another Man Implicates Himself in Two Murders*, Chicago Tribune Feb. 4, 1999, at 1; http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/porter.htm; *Porter v. Gramley*, 112 F.3d 1308 (7th Cir. 1997); *People v. Porter*, 164 Ill. 2d 200, 647 N.E.2d 972 (1995); *People v. Porter*, 111 Ill. 2d 386, 489 N.E.2d 1329 (1986).

9. *See* generally Frisbie and Garrett, VICTIMS OF JUSTICE (Avon 1998); http://ericzorn.com/columns/nicarico/; Coll, *Puzzle in Illinois: Who Killed Jeanine?; Murder, Trial Convictions and a Lawman's Doubts*, Washington Post, Jan. 27, 1987, at D1; Siegel, *Presumed Guilty; An Illinois Murder Case Becomes a Test of Conscience Inside the System*, Los Angeles Times Magazine, Nov. 1, 1992, at 18; *People v. Cruz*, 162 Ill. 2d 314 (1994); *People v. Cruz, 121 Ill. 2d 321 (1988)*; *People v. Hernandez*, 121 Ill, 2d 293 (1988).

worked, the exoneration of Cruz and Hernandez can be tied directly to the fortuity of Brian Dugan having been apprehended and having decided to admit his lone responsibility for all the rapes and murders he had committed. One can hardly assume that this sort of event will occur each and every time the system convicts an innocent defendant.

For Joseph Burrows, the road to exoneration began when one of the prosecution's key witness admitted that she had lied at trial and that she alone was guilty of the crime.[10] The physical evidence in the 1988 murder had always pointed to this woman, Gayle Potter, but she cut a deal with the prosecution and testified against Burrows, who was sentenced to death. Years later, Burrows's lawyers discovered a letter Potter had written asking a friend to testify falsely to support her account implicating Burrows. Confronted with the letter, Potter admitted that she had falsely accused Burrows to minimize her own culpability and that she had committed the murder alone. Based on this startling new evidence, Burrows's conviction was vacated and he was released in 1995 when the prosecution announced that it would not retry him. Burrows's life had been saved because a letter from his accuser happened to have been located and the accuser was willing to admit that she lied. Hardly events that are likely to repeat themselves very often.

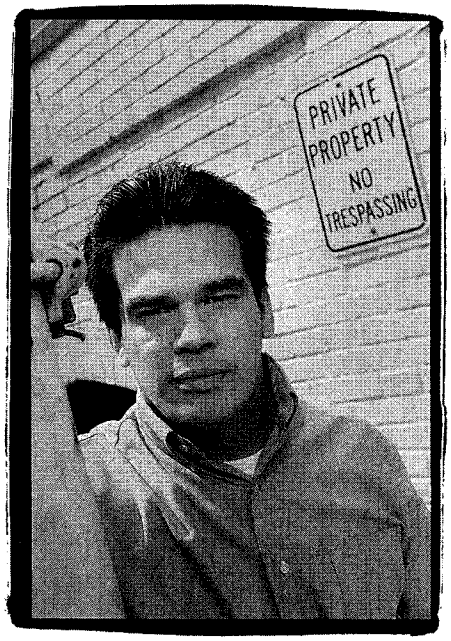
In Gary Gauger's case, the fortuities that led to the dropping of charges against him were truly extraordinary.[11] Gauger had been convicted of killing his parents and had been sentenced to death. The trial judge later reduced this sentence to life imprisonment without parole. On appeal, Gauger was granted a new trial because the interrogation that led to his supposed confession was held to have violated his Fourth Amendment rights.

The prosecution, however, decided not to go forward with a retrial because new evidence had emerged that exonerated Gauger and implicated two members of the Outlaws motorcycle gang. This evidence was developed by the United States Bureau of Alcohol, Tobacco and Firearm, which was investigating the Outlaws in relation to their violent war with the Hells Angels. As it happened, the ATF wiretap picked up two Outlaws boasting about having murdered the Gaugers and relishing the fact that they would never be caught because the Gaugers' son had been convicted. These two men have now been convicted in federal court. Had it not been for this fortuitous wiretap there is strong reason to believe that the prosecution would have proceeded to retry, and possibly reconvict, Gary Gauger for the very crime that rendered him an orphan.

Obviously, this kind of new evidence is rare indeed. In each of these cases, a true killer admitted to a crime even though he or she was under no official suspicion. That these events occurred in time to save the lives of these seven condemned inmates generates no reason for confidence that this evidence will always, or even usually, emerge in time to save the life of an innocent person on death row. We have no way of knowing how many innocent defendants have gone to the execution chamber because, in their case, the true killer has not confessed in time. It would be grave error, though, to delude ourselves into believing that this never happens because the miracles of the sort described above occur in each and every case of a wrongful conviction.

Compelling new evidence impeaching the prosecution's witnesses. Perry Cobb and Darby Tillis were exonerated only after a new witness emerged with evidence that destroyed the credibility of the prosecution's chief witness.[12] That witness, Phyllis Santini, had testified that she drove Cobb and Tillis to the crime scene and waited outside while they robbed and murdered two storekeepers. Although the first two trials ended in hung juries, Cobb and Tillis were both convicted and sentenced to death by the jury at their third trial.

After the Illinois Supreme Court



Rolando Cruz JENNIFER LINZER

reversed on various procedural grounds, the prosecution readied itself for a fourth trial. This is where serendipity played its role. A man named Michael Falconer happened to read an article about the case and recalled that he had worked with Phyllis Santini many years earlier in a factory.[13] More significantly, Falconer recalled that Santini had admitted to him at that time that she had falsely implicated two men in a murder in order to protect her boyfriend and herself, who were actually guilty. Falconer had dismissed this as idle talk, but now realized that Santini was indeed the key witness in the murder prosecution of two men.

Falconer's having read this article

10. *See* generally Bils, Chicago Tribune, Sept. 9, 1994, at 1; Bils, *Woman Says She Killed Man; Confession May Set Inmate Free*, Chicago Tribune, July 27, 1994, at 1; *People v. Burrows*, 172 Ill. 2d 169, 665 N.E.2d 1319 (1996); *People v. Burrows*, 148 Ill. 2d 196, 592 N.E.2d 997 (1992).

11. *See* generally Daly, *Biker Is Convicted of '93 Killings of Richmond Couple*, Chicago Tribune, June 16 2000, at Metro 3; Starks, *Gang Member Admits Killing Couple*, Chicago Tribune (McHenry Edition) March 5, 1999, at 1; Quintanilla, *Gauger Set Free in Killing of Parents*, Chicago Tribune (Northwest Edition), Oct. 5, 1996, at 1.

12. *See* generally Myers, *4 Years On Death Row, Trial After Trial, It All Became a Painful Joke*, Chicago Tribune, Sept. 4, 1998, at 1; http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/cobb.htm; *People v. Cobb*, 97 Ill. 2d 465 (1983).

Alejandro Hernandez LOREN SANTOW

was not the only piece of good fortune that saved Cobb and Tillis, though. The other fortuity related to Falconer's particular credibility–he himself was serving as a prosecutor in a neighboring county. Although a fourth trial ended in a hung jury, Cobb and Tillis were acquitted at their fifth trial. Had Falconer not read that issue of the newspaper, or had Falconer not been employed as a prosecutor, Cobb and Tillis would still have been innocent, but there is little reason to believe they would ever have been exonerated.

Similarly, with respect to Cruz and Hernandez, one of the factors leading to their exoneration was the admission of a Sheriff's Lieutenant, James Montessano, that he could not have been party to a key May 9, 1983 conversation with two other detectives.[14] These two detectives, who claimed to have heard what amounted to a confession from Cruz but failed to make any record of it for 18 months, had consistently explained that they called Montesanno at home that evening and he instructed them on how to proceed. At one earlier hearing, Montesanno had backed the officers on this, adding great credibility to their otherwise dubious account. Yet, at Cruz's third trial Montesanno informed the court that this account was clearly false–that no such telephone conversation had ever taken place. Fortuitously, the lieutenant was not simply asking the trier of fact to trust his memory. Rather, he produced credit card statements from 12 years earlier proving that he was vacationing with his family in Florida during the entire week in question. Any system that must rely on a law enforcement official to recant his earlier testimony, and to have 12-year-old credit card statements to back up his recantation, is hardly a system that can be said to be working.

DNA results. Finally, several of the cases involved exoneration through the results of DNA testing. In each of these the defendant is alive today in whole or in part because there happened to be biological evidence available and that evidence was susceptible to testing.

Ronald Jones was convicted and sentenced to death for a rape and murder.[15] For years, Jones's attorney sought DNA testing to prove Jones's innocence, but the prosecutors declined to cooperate and the lower courts refused to order such testing. Finally, after the Illinois Supreme Court ordered the testing, the results exonerated Jones completely. Because the evidence clearly established that the victim had been raped at the time of the murder, and that the crimes were committed by a lone perpetrator, the prosecution agreed to drop all charges against Jones.

To appreciate the fortuitous nature of this exoneration one must ask the following question: What if the victim had not been raped, and had only been murdered? Jones would still have been equally innocent, yet there would have been no DNA evidence to prove his innocence. Like so many other wrongly convicted defendants who were cleared by DNA, Jones owes his life to the fact that the true perpetrator raped the victim before he killed her.

Dennis Williams and Verneal Jimerson also benefitted from this fact. The DNA results in their case—conducted 18 years after the crime—corroborated the confessions of the true killers and excluded Williams, Jimerson, and two other men with whom they had originally been charged.[16]

Similarly, the cases of Rolando Cruz and Alejandro Hernandez got a great boost when DNA results excluded them and showed that Brian Dugan, the man who admitted lone responsibility for the rape-murder, fit the DNA profile of the person who committed the rape.[17]

In each of these cases, the innocent were freed, at least in part, because DNA testing was possible. DNA testing is an option in only a small minority of capital cases, however. Most capital cases yield no biological evidence sus-

13. *See* Skelly, *Death Derailed/Supreme Court Halts Railroad to the Chair*, Chicago Lawyer, November 1983, at 5.

14. *See* Possley, *The Nicarico Nightmare: Admitted Lie Sinks Cruz Case*, Chicago Tribune, Nov. 5, 1995, at 1.

15. *See* generally Mills and Armstrong, *Yet Another Death Row Inmate Cleared*, Chicago Tribune, May 18, 1999, at 1; Martin, *New Trial Likely in 1985 Murder of Young Mother; DNA Test Gives Death Row Inmate Hope*, Chicago Tribune, July 9, 1997, at 1; http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/jones.htm; *People v. Jones*, 156 Ill. 2d 225 (1993).

16. *See* Fegelman and Miller, *After 4 Released in 1978 Slayings, 3 Others Accused; Confessions, DNA Aid Case*, Chicago Tribune, July 4, 1996, at 1. See also *supra* n. 7.

17. *See* Gregory and Gorner, *Cruz Didn't Rape Nicarico, DNA Expert Says; But Prosecutors Not Moved by New Tests*, Chicago Tribune, Sept. 23, 1995, at 1.

ceptible to forensic analysis. To be sure, DNA evidence is a wonderful tool in cases in which it is possible, and it is critical that testing be made available in all such cases. It is imperative, though, that we not fall into the trap of treating DNA testing as a panacea for the wrongful conviction crisis. The risk of condemning the innocent is not restricted to cases in which DNA can later exonerate the defendant. (For example, only 12 of the 101 exonerations reported nationally have involved exculpatory DNA evidence.) DNA highlights problems in the system, it does not solve those problems and most certainly does not prove that the system works.

Steven Smith LOREN SANTOW

Indeed, even in cases involving rape—where biological evidence is typically present—the fact that such testing can be carried out depends on a series of fortuities. First and foremost, it depends on the law enforcement agencies' or the courts' having retained the evidence. This is not always the case. Indeed, when dealing with cases that are 15 or 20 years old it is quite common to learn that evidence has been lost or destroyed. Even if the evidence can be located, moreover, it is frequently too deteriorated to allow for forensic testing. Thus, each of these DNA exonerations is itself a reflection of a series of fortuities including (a) the presence of biological evidence in the first place; (b) the preservation of that evidence; and (c) the condition of the evidence. It is unreasonable to believe that all wrongly convicted defendants are the beneficiaries of all these factors falling into place. Instead, common sense makes clear that there are many innocent defendants who will never benefit from DNA testing. With so much turning on luck and serendipity, it is impossible to classify these cases as ones in which the system worked.

Where the system worked

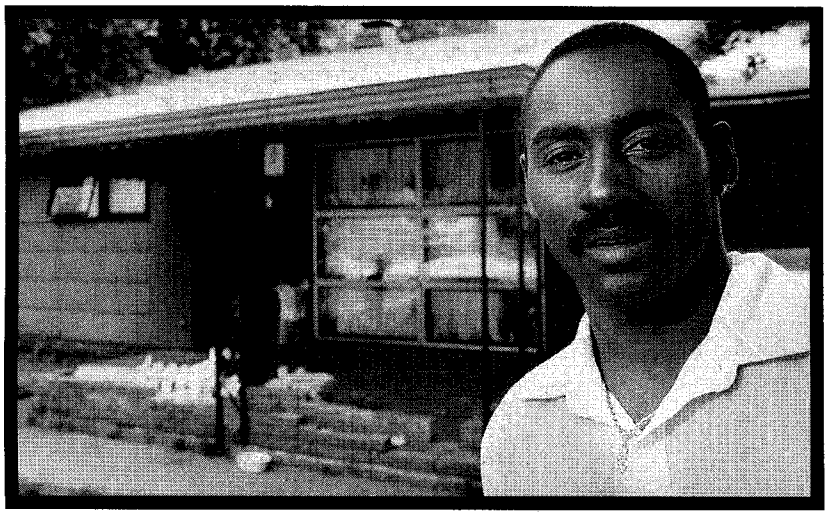
In contrast to the 10 cases described above, where various miracles and fortuities occurred before the innocent defendant was killed, there are three cases in which defendants were exonerated because the conventional system of appellate review worked. Even two of these cases, however, were affected by some external forces that cannot be relied upon to exert energy in most cases.

Steven Smith was convicted and sentenced to death based on the testimony of Debrah Caraway, who claimed that she witnessed the murder of an off-duty assistant warden outside a Chicago bar.[18] There were several problems with Caraway's testimony, including the fact that her description of the murder was dramatically inconsistent with the actual facts. According to Caraway, the victim was standing alone when Smith approached him and fired shots. The evidence was clear, though, that the victim was standing with two other men when he was shot. Despite the inconsistency, and despite the fact Caraway admitted she had been smoking crack cocaine that night, the Illinois Supreme Court ruled in 1990 that the evidence was sufficient to convict Smith. The court ordered a new trial, however, because the jury had been told prejudicially about Smith's gang affiliation. On retrial, a jury again convicted Smith based on Caraway's testimony. When Smith appealed this time, though, a unanimous Illinois Supreme Court ruled in 1999 that Caraway's testimony was insufficient to support a conviction. Hence the court freed Smith.

This was not a case in which any new evidence emerged exculpating Smith. In this sense, this was a case in which forces intrinsic to the system functioned. It is important to note, however, that there was a remarkable change in the Illinois Supreme Court's view of the same evidence between its first opinion in 1990 and its second opinion in 1999. The court went from unanimously finding the evidence sufficient to unanimously finding the evidence insufficient. It is likely that this change reflected a newfound consciousness about the risk of wrongful convictions. In the decade between the two opinions in *Smith,* 10 men had been freed from death row and surely the justices of the Illinois Supreme Court had become more sensitive in the intervening nine years about the fact that innocent people can be convicted and sentenced to death. Thus, while the Smith case is certainly one in which the system worked, it is also a case where the court was conditioned by all of the cases in which external forces had exposed the epidemic of wrongful convictions in capital cases.

Steven Manning is another case in which it appears that the system itself worked.[19] Manning was convicted and sentenced to death based primarily on the testimony of Thomas Dye, a jailhouse snitch, who claimed that Manning had confessed having com-

18. *See* generally Armstrong and Lighty, *Death Row Conviction Thrown Out; 11th Reversal in 12 Years Will Free Chicago Man,* Chicago Tribune, Feb. 20, 1999, at 1; *People v. Smith,* 185 Ill. 2d 532 (1999); *People v. Smith,* 141 Ill. 2d 40 (1990).



Carl Lawson LOREN SANTOW

mitted the murder. The prosecutors had wired Dye but none of his conversations with Manning contained anything incriminating about the murder in question. Nonetheless, the case went to trial and Manning was convicted and sentenced to death based on the testimony of Dye and testimony from the victim's wife that he was in fear of Manning.

The Illinois Supreme Court granted Manning a new trial in 1998 based on the erroneous admission of the victim's wife's testimony and the tapes that prejudicially implicated Manning in some other crimes unrelated to the murder for which he was being charged. As prosecutors began the process of preparing the case for retrial, the *Chicago Tribune* published an extensive series of articles on problems affecting capital punishment in Illinois, one of which focused primarily on Tommy Dye's role as a snitch in the Manning case.[20] In January 2000, prosecutors announced that they would not retry Manning.

As with Stephen Smith's case, this is a case in which a condemned inmate was cleared without any significant external new development. At the same time, it would appear naive to divorce the decision not to retry Manning from the very changed public mood about wrongful convictions and the death penalty, as well as the pressure brought to bear by the *Tribune's* focus on the case. In this sense, Manning was, at the very least, an indirect beneficiary of all the extrinsic fortuities that led to the spate of exonerations.

Of all the Illinois exonerations, Carl Lawson's case appears to be the best example of the system working well, without extrinsic intervention or newly discovered evidence.[21] Lawson was convicted and sentenced to death for the murder of an 8-year-old based largely on evidence that Lawson's bloody shoe print was found at the crime scene. Lawson admitted that the shoe print was his, but explained that, like everyone else in the neighborhood, he had gone to the crime scene upon hearing that the boy had been killed.

At trial, a prosecution expert testified that this shoe print was left at the time of the murder, not at the later time that Lawson claimed to have been there. Although Lawson sought funds from the trial court to hire his own expert, the court refused that request. The Illinois Supreme Court reversed, holding that Lawson was unconstitutionally deprived of his right to hire an expert, and that his lawyer was laboring under a conflict of interest.

Upon retrial, Lawson presented the testimony of an expert who concluded that weather conditions would have kept the blood from drying and that Lawson's account of having left the shoe print after the body was discovered was entirely consistent with the physical evidence. Lawson's first retrial ended in a hung jury, voting 11 to 1 for acquittal. Lawson was retried again, and was acquitted by the jury. Hence, this is the one case in which it appears that the system of appellate review and trial by jury led to the exoneration without the outside intervention of external forces or the fortuitous discovery of new evidence.

***

The 13 exonerations of inmates who were condemned to die in Illinois prove many things about the capital justice system. On one level, the exonerations reveal the inherent fallibility of any human enterprise, including capital punishment. On another level, the exonerations reveal problems with respect to unrecorded confessions, eyewitness identification, jailhouse snitches, bad lawyering, prosecutorial misconduct, and various other vices that plague the criminal justice system. There is much to be learned from studying these cases carefully, and they are important fodder for the debate over whether the death penalty is too flawed to fix. It is clear, though, that these cases cannot reasonably be interpreted as demonstrating that the system works well at uncovering wrongful convictions. Ten of the 13 cases are the clear products of extrinsic fortuities leading to exoneration. Without these miracles, the system would have killed innocent prisoners.

The frightening realization is that for all the horror these 13 men lived through, they are the lucky ones. They could have ended up as other innocent men and women most certainly have—executed without the evidence of their innocence ever emerging.

19. *See* generally Mills and Armstrong, *Another Death Row Inmate Cleared,* Chicago Tribune, January 19, 2000, at 1; http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/manning.htm; *People v. Manning,* 182 Ill. 2d 193 (1998).

20. *See* Mills and Armstrong, *The Inside Informant; The Failure of the Death Penalty in Illinois,* Chicago Tribune, Nov. 16, 1999 at 1.

21. *See* generally Goodrich, *Suspect Innocent in Death of Child; He Faced Death Row Through Three Trials,* St. Louis Post-Dispatch, Dec. 13, 1996 at 1A; http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/lawson.htm; *People v. Lawson,* 163 Ill. 2d 187, 644 N.E.2d 1172 (1994).

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Nominations should be submitted by February 1, 2003.

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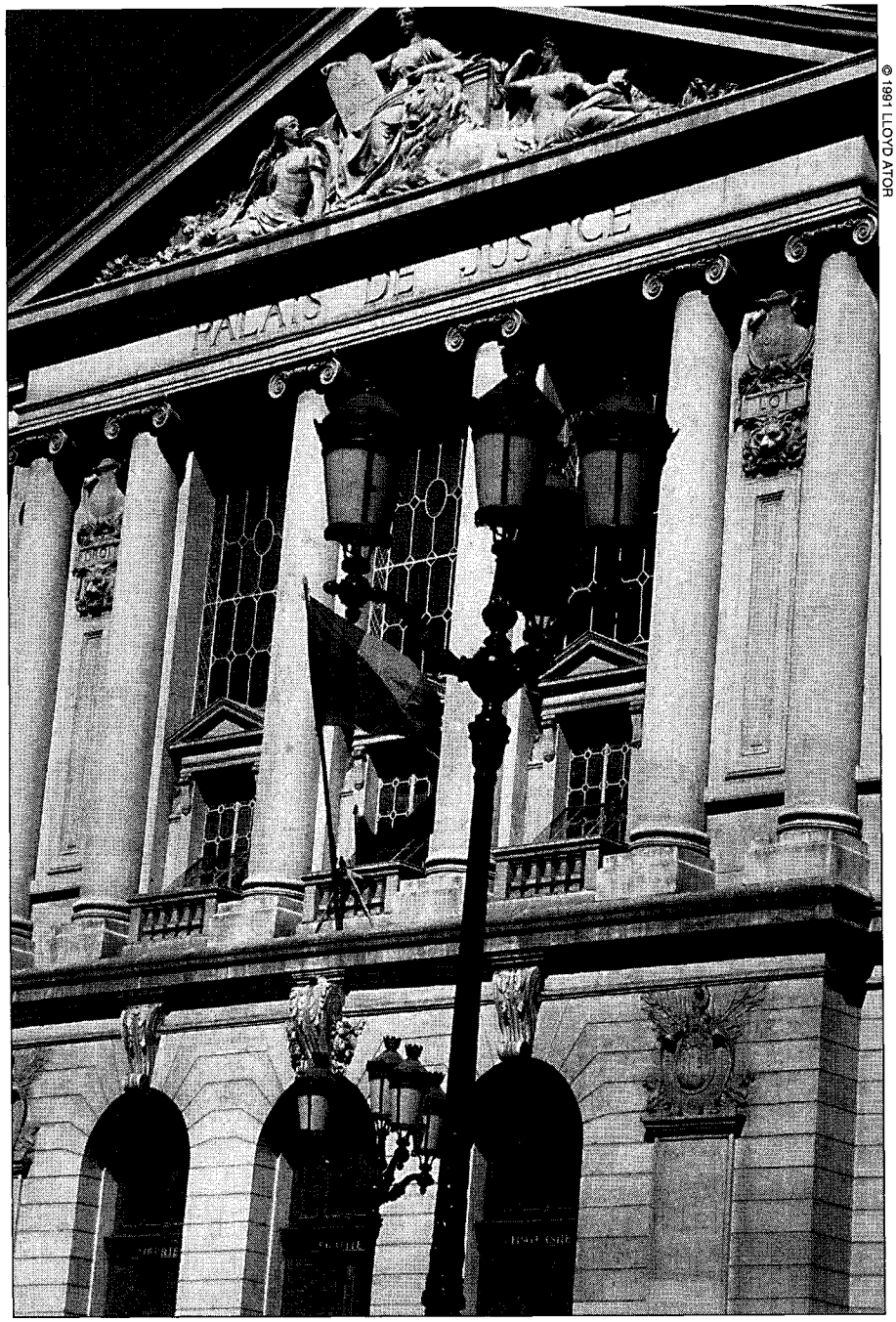
U.S. District Judge James Lawrence King

Joint Recipients—U.S. Circuit Judge Frank M. Coffin *and* U.S. Circuit Judge Diana E. Murphy

U.S. Circuit Judge Edward R. Becker



The Palais de Justice, Nice

WHAT CAN WE LEARN FROM OTHER NATIONS ABOUT THE PROBLEM OF WRONGFUL CONVICTION?

BY C. RONALD HUFF

Examining procedures in other countries where wrongful conviction rates appear to be lower may offer some lessons for the U.S.

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The public policy salience of wrongful conviction has recently grown in the United States and many other nations. The increasing awareness of this issue by citizens and policy makers has been closely linked to the highly publicized post-conviction DNA exonerations of individuals who served long prison sentences (especially in the United States) and the increasing abolition of or moratoria on the use of the death penalty.

Death penalty abolition/moratoria have resulted from humanitarian and due process and equal protection concerns. The gravity of these concerns is made clear by studies involving the possibility of error in capital cases. In their seminal study, Bedau and Radelet[1] argued that at least 23 innocent persons have already been executed in the United States, and in a more recent and highly publicized study examining thousands of capital sentences over a 23 year period (1973-1995), Liebman

1. Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STANFORD L. REV. 21-179 (1987). *Also see* Radelet, Bedau, and Putnam, IN SPITE OF INNOCENCE (Boston: Northeastern University Press, 1992).

et al[2] found serious, reversible errors in nearly 7 of every 10 cases. The great majority of those who are wrongfully convicted do not face the death penalty or life in prison, but such errors often result in many years of unwarranted punishment and serious damage to the lives of the wrongfully convicted, while the actual offenders in these cases are free to commit additional crimes.

While the past decade has brought significant growth in the literature on the subject of wrongful conviction, nearly all research and discussion has been in the context of individual cases occurring within a single nation. This article will focus on wrongful conviction from the perspective of public policy issues that might usefully be viewed in a cross-national context. It is often the case that the best way to improve our understanding of our own nation, culture, or criminal justice system is to view it in the context of other nations, cultures, and systems of justice.

"Wrongful Conviction"

There are a number of ways to define "wrongful conviction." Consider, for example, the following excerpt from a very thoughtful and carefully written report of the Law Commission of New Zealand addressing the issue of compensation for wrongful conviction:

> . . . Potentially, claimants for compensation could include all those:
> • arrested, detained in custody and released without charge;
> • held in custody and charged, but whose charges are dropped before their first court appearance;
> • denied bail and remanded in custody, but acquitted at trial;
> • convicted and imprisoned, but acquitted on appeal;
> • convicted and imprisoned having exhausted rights of appeal, but who are later pardoned, or have the conviction quashed without an order for retrial, or are acquitted on a retrial following a referral by the Governor-General . . .

New Zealand decided that compensation would be paid only to those fitting the last category, and the Law Commission's report defined "wrongful conviction" and "wrongful prosecution" as " . . .the conviction or prosecution on indictment of a citizen who is innocent. .. "[3]

Another attempt to define wrongful conviction (also in the context of compensation) can be found in a recent amendment to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms:

> Article 3 - Compensation for Wrongful Conviction
>
> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[4]

In addressing this definitional issue, colleagues and I have said: "Convicted innocents . . . are people who have been arrested on criminal charges . . . who have either pleaded guilty to the charge or have been tried and found guilty; and who, notwithstanding plea or verdict, are in fact innocent."[5] Others have included cases in which charges were dropped without retrial or those in which convictions were overturned in court and the defendant was found not guilty. Our definition excluded many cases where the conviction was overturned and either the charges were dropped or the defendant was found not guilty, because neither of those outcomes by itself establishes innocence beyond a reasonable doubt. A not guilty finding does not necessarily mean that the person was actually innocent.

Estimating the magnitude

No systematic data on wrongful conviction are kept in the U.S. and certainly it is not possible at this point to estimate accurately or compare the magnitude or frequency of this problem across jurisdictions.[6] In fact, estimating the extent to which wrongful conviction occurs is a much greater challenge than estimating the true incidence rate of crime, since victimization surveys (including cross-national surveys) have greatly facilitated the latter task, allowing us to extrapolate between official crime reports and victimization data. No similar credible methodology has been developed to estimate the true extent of wrongful conviction, since many cases go undiscovered and since analogous surveys of prisoners, for example, would lack public credibility.

In the previously referenced study, my colleague and I conducted a survey, utilizing an intentionally conservative Ohio sample dominated by prosecutors, judges, and law enforcement officials, and a national sample of attorneys general. The total sample size was 353 and we received 229 responses (a 65 percent response rate). We asked our sample to *estimate* what proportion of all felony convictions resulted in wrongful convictions. Of those who provided an estimate, 72 percent said that wrongful conviction occurs in less than 1 percent of all felony cases. To be conservative, we took the midpoint of the

2. Liebman, Fagan, West, and Lloyd, *Capital Attrition: Error Rates in Capital Cases,* 78 TEX. L. REV. 1839-1865 (2000).

3. The Law Commission (New Zealand), *Compensation for Wrongful Conviction or Prosecution* (Preliminary Paper 31) (Wellington, New Zealand, April 1998).

4. Council of Europe, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11* (Strasbourg, France, November 1, 1998).

5. Huff, Rattner, and Sagarin, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 10 (Thousand Oaks, CA: Sage Publications, 1996).

6. Note that there are informal *estimates* such as one cited by a senior analyst in the Research Branch of Canada's Library of Parliament:

" . . . It has been claimed that in Great Britain, the wrongful conviction rate may be as high as .1%—or one out of every thousand people. Another estimate is that there may be 15 cases of wrongful conviction each year in Great Britain. . . There are no similar estimates of the number of wrongful convictions in Canada. An official with the Department of Justice recently estimated that the Department receives about 30 applications a year for the review of criminal convictions . . ."(Rosen, *Wrongful Convictions in the Criminal Justice System,* Ottawa, Canada, January 1992, at 1). The estimate of 15 cases per year in Great Britain appears to correspond fairly well with the *known* cases of wrongful conviction reported by the Criminal Cases Review Commission, *infra* n. 20. (67 convictions quashed in four years).

category of response they selected ("less than 1%") and decided to see what it would really mean if the U.S. criminal justice system is, indeed, 99.5 percent accurate and errs in only 1/2 of 1 percent of all felony cases.

Based on the most recent data available (Uniform Crime Report data for 1999), there were about 2.3 million arrests for index crimes alone. We know that about 70 percent of those arrested are ultimately convicted (about 1.5 million). Therefore, if we assume that the system is 99.5 percent accurate, we can estimate that about 7,500 persons arrested for index crimes were wrongfully convicted in the United States in 1999. Thus, it is clear that the U.S. has such a large base rate of arrests for serious crimes that only a small error rate will produce thousands of wrongful convictions each year.[7]

Also, Scheck, Neufeld, and Dwyer recently reported that in DNA testing conducted in 18,000 criminal cases, more than 25 percent of *prime suspects* were excluded prior to trial.[8] Since the great majority of criminal cases do not produce biological material to be tested, one can only speculate as to the error rate in those cases. These findings raise serious questions about the accuracy of the U.S. criminal justice system.

Causes

The corpus of extant research has demonstrated that the causes of wrongful conviction include eyewitness error; overzealous law enforcement officers and prosecutors who engage in misconduct, including withholding evidence; false/coerced confessions and suggestive interrogations; perjury; misleading lineups; ineffective assistance of counsel; inappropriate use of informants or "snitches"; community pressure for a conviction; forensic science errors, incompetence, and fraud; and the "ratification of error" (the tendency to "rubber stamp" decisions made at lower levels as cases move up through the system).

Usually, more than one factor contributes to the error and there are interaction effects among these factors. For example, police or prosecutorial overzealousness might be combined with prosecutorial withholding of important evidence and the inappropriate use of jailhouse "snitches"—all occurring in a case in which the defendant has inadequate assistance of counsel, thus impeding his/her ability to discover these errors.

Cross-national considerations

A major unanswered question is the extent to which variations across criminal justice *systems* (and the sociopolitical contexts in which they are embedded) might account for some of the *perceived* cross-national variance in the frequency of wrongful convictions. Recognizing that available data are inadequate to know definitively the relative rates of wrongful conviction across nations, there are, nonetheless, empirical data for the U.S. that suggest that the problem is more significant than has been reported elsewhere, although this is subject to empirical confirmation when better data become available. Based on known cases of wrongful convictions and post-conviction DNA exonerations (including death penalty cases, as noted above), the error rate in the U.S. *appears* to exceed the frequency of known errors in other nations that have established procedures for reviewing cases involving potential wrongful convictions.[9]

It may be instructive, therefore, to assess some of the major features of other criminal justice systems to determine what aspects of those systems might, hypothetically at least, provide additional protections against (or risks of) wrongful conviction when compared with the United States. Fortunately, a number of scholars have provided valuable comparative information concerning world criminal justice systems, and the U.S. Bureau of Justice Statistics funded a series of essays that provided an excellent basis for comparing major aspects of more than 40 nations' systems of criminal justice.[10] Due to space limitations, the following discussion will include only a few nations, simply to illustrate some potentially interesting variations.

Australia.[11] Australia has a federalist government consisting of a national government and six state governments; the states have been mainly responsible for the development of criminal law. The Australian legal system, like that of the U.S. and other nations that were formerly ruled by the United Kingdom, maintains many vestiges of the British system, although since 1963 Australian courts have not regarded English court decisions as having special relevance for Australian cases. Australia has an adversarial legal system, and the presumption of innocence is highly valued.

Police officers in Australia are generally permitted to stop and apprehend anyone who appears to be in the act of committing or who is about to commit an offense. They are also generally allowed to make arrests without warrants. Although the police must generally obtain a search warrant from a judge or magistrate before they can enter premises and seize property, they are permitted to seize illegal drugs and weapons without first obtaining a warrant.

Importantly, confessions are now routinely videotaped in cases involving allegations of serious offenses.[12] The police conduct the necessary in-

7. Huff, Rattner, and Sagarin, *supra* n. 5. *Also see* Huff, *Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address*, 40 CRIMINOLOGY 1-18 (2002).

8. Scheck, Neufeld, and Dwyer, ACTUAL INNOCENCE (New York: Doubleday, 2000).

9. *See, for example*, data provided by Great Britain's Criminal Cases Review Commission, *infra* n. 20, and by a senior analyst for Canadian Parliament (*supra* n. 6).

10. U.S. Department of Justice, Bureau of Justice Statistics, WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (Washington, DC: Bureau of Justice Statistics, 1993; revised 2001).

11. Based on Biles, *World Factbook of Criminal Justice Systems: Australia* (Washington, DC: Bureau of Justice Statistics, 1993).

12. Note that electronic recording of interrogations is now either common or mandatory in England and Canada, as well as Australia. One issue that has arisen, however, involves the decisions as to when the videotaping is to begin and whether it must be continuous or may be interrupted. These, of course, are very important decisions. *See* Westling and Waye, *Videotaping Police Interrogations: Lessons from Australia*. 25 AM. J. CRIM. L. 493-543 (1998).

vestigation and file charges (sometimes with the involvement of the Director of Public Prosecutions) and (except for one territory) prosecute the case if it is in the lower courts. The director may also decide that the case should be heard on indictment in a superior court, but if so, then a preliminary hearing is held in a lower court to determine whether the evidence warrants going to trial.

The granting of bail is strongly presumed, but suspects charged with serious crimes generally are held in custody while awaiting trial. Accused persons have the right to defend themselves but generally prefer representation in serious cases. The High Court of Australia ruled that in all cases involving allegations of serious offenses, the accused must have access to legal advice. At trial, both the prosecution and the defense may question and cross examine witnesses.

In 1993 a national system of free legal aid was developed, based on a means test and an assessment of the case's merits. As in the U.S., legal aid may be provided by either a public defender or by the appointment of a private legal representative. If the accused pleads guilty, a judge or magistrate may impose a sentence without trial. If the accused pleads not guilty, then an adversarial procedure determines whether the evidence supports conviction. If the case involves a serious charge, it is heard in a higher court, generally with a 12-person jury.

At the sentencing stage, a judge or magistrate determines the sentence and in serious cases there is often an adjournment, during which the prosecution and the defense present their positions regarding the appropriate sentence. In all but one jurisdiction, pre-sentence reports are prepared to assist the judiciary, while in South Australia victim impact statements may also be submitted. Capital punishment has not been carried out since 1967 and has, along with corporal punishment, been abolished throughout Australia.

France.[13] The French political system includes a central government with 22 regions and many other subunits of government that have a certain degree of local autonomy. France's criminal justice system has evolved through a number of stages, from accusatory to inquisitorial and secret proceedings to the establishment of a judicial system patterned more closely after English law.

Police officers in France can stop and arrest a suspect and take him/her before a public prosecutor if they observe an offense in progress or one that has just been committed. In making this arrest, officers are permitted to conduct searches and seizures of witnesses and suspects. Suspects may be kept under observation for 24 hours (48-96 hours in cases involving drug trafficking/use or terrorism) as long as the police have informed the public prosecutor's office.

If a crime has not been directly observed (in the U.S., this is called an "on view arrest") a preliminary investigation must be carried out by the prosecutor's office. In such cases, suspects may only be detained if there is incriminating evidence as determined by a "judiciary police officer." Following a period of 21 hours under observation, suspects have the right to ask for an attorney and to notify their families of their detention. Suspects may also be released on bail from pre-trial detention, if authorized by a judge.

The accused may obtain his/her own lawyer or may have a state-appointed attorney. Judicial decisions may also be appealed by the accused, who may request a suspended sentence until the appeal is decided. The accused also has a specific right to compensation if abuse takes place during the period of custody. Prior to trial, the police conduct a preliminary investigation under the direction of the public prosecutor. The judicial stage can be started by either the public minister or by the victim, with the public minister prosecuting the accused and deciding whether the case should be brought before a judge (in about 15 percent of the cases) or resolved without the judge's involvement. Victims may also bring a civil action against the suspect, thus forcing the public prosecutor to take action.

Magistrates have the power to examine the suspect by interrogation, confrontation, and other means. They may also arrest the suspect and take him/her before a judge, at which point the magistrate reads the charge and the statement of the defense. Judges must ultimately explain the reasons for their final decisions. Importantly, no "plea bargaining" is permitted, since suspects are not allowed to plead guilty. The judge who determines the punishment also determines how that punishment will be implemented, with the accused, the victim, and the public minister all having input into the sentencing process. In addition, expert witnesses are given great deference in France. The death penalty is not a sentencing option, having been abolished in 1981.

Spain.[14] The political system of Spain includes 17 regional governments and a central government, which administers the police functions except in Catalonia and the Basque region. Spain has a legal system that can be categorized as "European-Continental," in which prosecution cannot occur unless behavior has first been defined as criminal and a penalty has been assigned to that specific behavior. The investigative process is the responsibility of a judge, with the suspect being afforded substantial procedural rights. Hearings are adversarial, in which the prosecution is carried out by a public attorney utilizing the findings of the investigative judge. Hearings are public and evidence is produced in the presence of the accused, who has the assistance of counsel and, if necessary, a translator.

The Spanish criminal justice system's roots are in the Middle Ages and can be traced to the German system. It was later influenced heavily by French rationalism in the 18th cen-

13. Based on Borricand, WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS: FRANCE (Washington, DC: Bureau of Justice Statistics, 1993).

14. Based on Canivell, WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS: SPAIN (Washington, DC: Bureau of Justice Statistics, 1993).

AP PHOTO/ARANBERRI

While the police in Spain may initiate the investigation, they must report to the judge that this has happened within 24 hours of the time they begin the investigation.

tury and by significant liberal reforms in the 19th century, with these reforms resulting in the adoption of the first Spanish Penal Code in 1822, a new Penal Code in 1848, and subsequent modifications.

Police in Spain are required to detain anyone who is suspected of participating in any act of delinquency or who has escaped from prison or who has committed a crime while incarcerated. In addition, they must detain anyone accused of crimes that are punishable by a prison term of six or more years or of lesser crimes if, in their judgment, the person will not appear before the court when issued a summons. Police are required to obtain judicial warrants for search and seizure in private residences unless the owner grants permission or a crime is in progress.

The police are authorized to deal with minor infractions themselves, but more serious offenses must be taken before the courts. The accused has the right to remain silent; to be told the nature of the accusations; to ask for evidence to be produced; to have a speedy trial; and to request specific counsel or have counsel appointed. Interestingly, it is reported that most lawyers in Spain consider it an honor to be asked to provide counsel for the accused, even if they know they will receive only a small fee. Interrogation without counsel is permitted if no lawyer has appeared within eight hours of notification to the local legal profession's association—and then only if the accused consents. Detainees may also request that family members or friends be informed of their detention. They have the right to an interpreter if needed, as well as the right to have the assistance of a physician. If the accused is a minor, he/she has the right to have parents or those with parental authority be informed of the detention.

During the proceedings, the accused can remain silent; can confront witnesses; can see the evidence; can be defended by an attorney; and can speak after all others have been heard. The police assist the investigating judge in preparing the case for trial. While the police may initiate the investigation, they must report to the judge that this has happened within 24 hours from the time they begin the investigation. The public attorney may also request that the judge carry out the investigation.

Major offenses receive a two-part trial involving an investigation stage and a hearing stage, the latter being conducted orally and open to the public, although written briefs are made and are attached to the proceedings. There are no alternatives to trial, and most cases are decided by trial. The accused may plead guilty, and if their attorneys agree, the case may be handled without a

public hearing. However, in serious cases where the public attorney asks for a sentence of more than six years, the accused may not plead guilty and a public hearing must take place. It is reported that approximately 20 percent of all accused plead guilty. Cases can also be dropped if the allegations are not proven by the investigation or when the accused is clearly not responsible (e.g., mental illness). Punishments in Spain also do not include the death penalty, which was abolished by the 1978 Constitution. It was seldom utilized even when authorized, generally being commuted instead to long-term prison sentences.

Comparative observations

A number of questions can be asked that suggest potentially fruitful lines of inquiry in a cross-national study:

- Is there any evidence that the compulsory videotaping of interrogations and confessions can be effective in reducing the problem of false and coerced confessions that ultimately lead to wrongful convictions?
- What role does the death penalty play in producing wrongful convictions? Does the existence of the death penalty in the United States encourage guilty pleas by innocent defendants simply to avoid the death penalty, in the hope that during their imprisonment the truth will emerge?
- How, if at all, is the variation in the permissive use of warrantless searches and seizures related to wrongful conviction?
- How does the quality of legal representation for the accused compare across nations? Why do attorneys in Spain apparently regard it as an honor to represent the accused, and does that translate into superior performance by those attorneys? What is it about the culture of the legal profession in Spain that has enabled this apparent sense of honor to develop?
- What is the comparative contribution of plea bargaining in generating wrongful convictions? France does not allow plea bargaining and Spain allows guilty pleas only when the accused may be facing a sentence of six years or more (only about 20 percent plead guilty, reportedly). What impact do these policies have on the error rates in those nations, as compared with the U.S.?
- Where interrogations are permitted without attorneys being present (in Spain, for example, after eight hours have passed and no attorney has appeared despite a request to the legal aid office), do those interrogations lead to a higher incidence of error?

Public policy recommendations

The growing importance of wrongful conviction demands a commensurate and thoughtful public policy response in the United States. Space limitations preclude a comprehensive discussion of reforms that are needed, but in the context of this article the following are among the most important recommendations, based on existing research.

Compensation. Those who are wrongfully convicted are *victims.* They are victims of a criminal justice system that is supposed to protect them but has, instead, erroneously imposed on them the authority and power of the state, often depriving them of their liberty or even their lives. About four decades ago, New Zealand became a pioneer in developing a national system of crime victim compensation. Let us return for a moment to the aforementioned report of the Law Commission of New Zealand, as the Commission pondered the appropriateness of compensating the wrongfully convicted:

> The essence of a free society is the right of a law-abiding citizen to freedom of action without exposure to interference by the state. Deprivation of that right by arrest or imprisonment is, in general, justifiable only when that citizen has engaged in conduct so damaging to the interests of others, or society as a whole, as to warrant application of the criminal law . . . Conviction and imprisonment bring with them . . . drastic consequences. Apart from loss of liberty, the harshness and indignities of prison life, and suspension of voting rights, imprisonment often involves loss of livelihood and future employment prospects; loss of one's home and other personal property; breakup of family, the loss of children, and other personal relationships; and stigmatisation and damage to reputation. . .[15]

My interviews with the wrongfully convicted, as well as the published work of others, support all of the Law Commission's observations concerning the impact of wrongful conviction—especially incarceration for a significant period of time.

To address these problems, states should enact measures (as New Zealand did in 1998) to fairly compensate those who are wrongfully convicted, at least those who serve time in prison following their convictions. The proposed Innocence Protection Act of 2001 addresses this objective, as noted below (also see page 121). States should also assign a "case manager" for each of these individuals and make available to them and their families a full range of counseling, social services, and employment assistance to help reintegrate them into society.

The death penalty. Since all convictions are based on a probabilistic assessment of guilt and are subject to error, they ought to be reversible, allowing the innocent person to be freed and compensated. All criminal sentences except the death penalty allow this opportunity, but execution of the innocent forecloses this option. Therefore, the death penalty in the U.S. should be abolished and replaced by prison sentences of 20 or 30 years or life without parole, depending on the facts of each case. Samuel Gross recently found that a majority of Americans surveyed, both supporters and opponents of the death penalty, indicated that the issue of innocence caused them concern about the propriety of the death penalty.[16]

Finally, abolition of the death penalty would bring the U.S. in line with other nations. Such abolition is, for example, a requirement of member-

15. *Supra* n.3, at 1.

16. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal,* 83 CORNELL L. REV. 1448-1475.

ship in the European Union and Russia has had a moratorium in place since 1996. In fact, the existence of the death penalty in the U.S. has created a paradoxical situation in which our government's requests to other nations for the extradition of terrorists and other mass murderers will often be denied unless we can assure those governments that the defendants will not be executed—assurances that we do not provide for many of our own citizens facing the death penalty, some of whom may well be innocent.

The Innocence Protection Act. Two important factors that can help prevent wrongful convictions (and exonerate the innocent) are DNA testing of biological evidence and improving the quality of legal representation in the United States. Both of these factors are addressed in the proposed Innocence Protection Act of 2001. This Act (currently S. 486 in the Senate and H.R. 912 in the House) represents a bi-partisan effort to reduce the risk of wrongful conviction in capital cases, without taking a specific position on the death penalty itself (some prominent supporters of this legislation also support the death penalty). This proposed legislation is designed to:

- ensure that convicted offenders can request DNA testing on evidence from their case that is in the government's possession to prove their innocence;
- help states provide professional and experienced lawyers at every stage of a death penalty case;
- require states to inform juries of all sentencing options, including the option to sentence a defendant to life imprisonment without the possibility of parole;
- provide those who are proven innocent after an unjust incarceration some measure of compensation; and
- make sure the public has more reliable and detailed information regarding the administration of the nation's capital punishment laws.

Those convicted of crimes where biological evidence is available for testing should be allowed to request such tests and prosecutors should agree to such testing. Also, biological evidence in criminal cases should be preserved for testing throughout the duration of an offender's sentence. The rate of DNA exonerations tripled between 1996 and 2000,[17] and further advances in forensic science will continue to produce scientific evidence of innocence in many cases. And the quality of legal representation is critical, as noted by former Attorney General Janet Reno:

> . . . In the end, a good lawyer is the best defense against wrongful conviction, and, I would add, a good prosecutor might equal them by not charging the person in the first place, and the good defense lawyer who fills in the gaps or points out the gaps can aid and abet that effort. In short, we should all have one common goal, that justice be done . . .[18]

Innocence commissions. Innocence commissions should be established at the state and federal levels in the U.S. As Griffin[19] has noted, the commissions could review appeals, then refer appropriate cases to trial-level courts that could then entertain collateral attacks on the conviction. They could hold hearings and decide to dismiss the appeal/referral, order a new trial, or vacate the conviction. The best-established exemplar is Great Britain's Criminal Cases Review Commission (CCRC), an independent body responsible for investigating suspected miscarriages of justice in England, Wales, and Northern Ireland. According to the most recent data available, the Commission had received 5,051 applications and had reviewed 4,353 from 1997-2001. Interestingly, of 101 cases that had subsequently been heard by the courts following CCRC referrals, 67 convictions had been quashed, 33 had been upheld, and one was pending as of June 2001.[20] Thus, the argument that such a review commission would overburden the courts does not appear to find empirical support thus far with respect to the British experience. (Editor's note: Barry Scheck and Peter Neufeld discuss innocence commisions at greater length on page 98 of this issue).

Research questions

Future research on wrongful conviction can be enriched by studies that include cross-national, comparative research designs.[21] In addition to the questions posed earlier concerning the specific nations whose criminal justice systems were summarized above, some general cross-national research questions might include:

(1) Are some criminal justice systems more likely to produce wrongful convictions than others? If so, why?

(2) What is the level of public tolerance for errors leading to the conviction of those who are factually innocent, as opposed to errors that free those who are factually guilty?

(3) Are some individuals more at risk for wrongful conviction than others? Does this vary across jurisdictions?

(4) In societies that are relatively homogeneous with respect to race and ethnicity, is eyewitness identification any more accurate than elsewhere, such as in the U.S.?

(5) In nations where the presiding judge examines the evidence while the attorneys for the state and for the accused play only supplementary roles, is it less likely that evidence favorable to the defense will be suppressed?

17. Scheck and Neufeld, *DNA and Innocence Scholarship*, in Westervelt and Humphrey, eds., WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE (New Brunswick, NJ: Rutgers University Press, 2001).

18. Reno, remarks at National Symposium on Indigent Defense, Washington, DC, June 29, 2000.

19. Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective.* 16 AM. U. INTL. L. REV. 1241-1308 (2001).

20. Criminal Cases Review Commission, *Annual Report 2000-2001* (London: Criminal Cases Review Commission, June 18, 2001).

21. A colleague, Martin Killias (University of Lausanne), and I are organizing an international network of researchers and policy makers who are interested in conducting research on wrongful conviction. Interested persons may contact either of us at: rhuff@uci.edu or Martin.Killias@ipsc.unil.ch.

Toward the formation of "INNOCENCE COMMISSIONS" in America

By Barry C. Scheck and Peter J. Neufeld

By monitoring and investigating errors in the criminal justice system, innocence commissions could help remedy systemic defects that bring about wrongful convictions.

In the United States there are strict and immediate investigative measures taken when an airplane falls from the sky, a plane's fuel tank explodes on a runway, or a train derails. Serious inquiries are swiftly made by the National Transportation Safety Board (NTSB), an agency with subpoena power, great expertise, and real independence to answer the important and obvious questions: What went wrong? Was it system error or an individual's mistake? Was there any official misconduct? And, most important of all, what can be done to correct the problem and prevent it from happening again? Indeed, since the primary purpose of the NTSB is to protect the public safety, it will sometimes issue safety recommendations before its investigation of a crash is complete, recommendations identifying problems that may not even turn out to be the ultimate cause of the crash.

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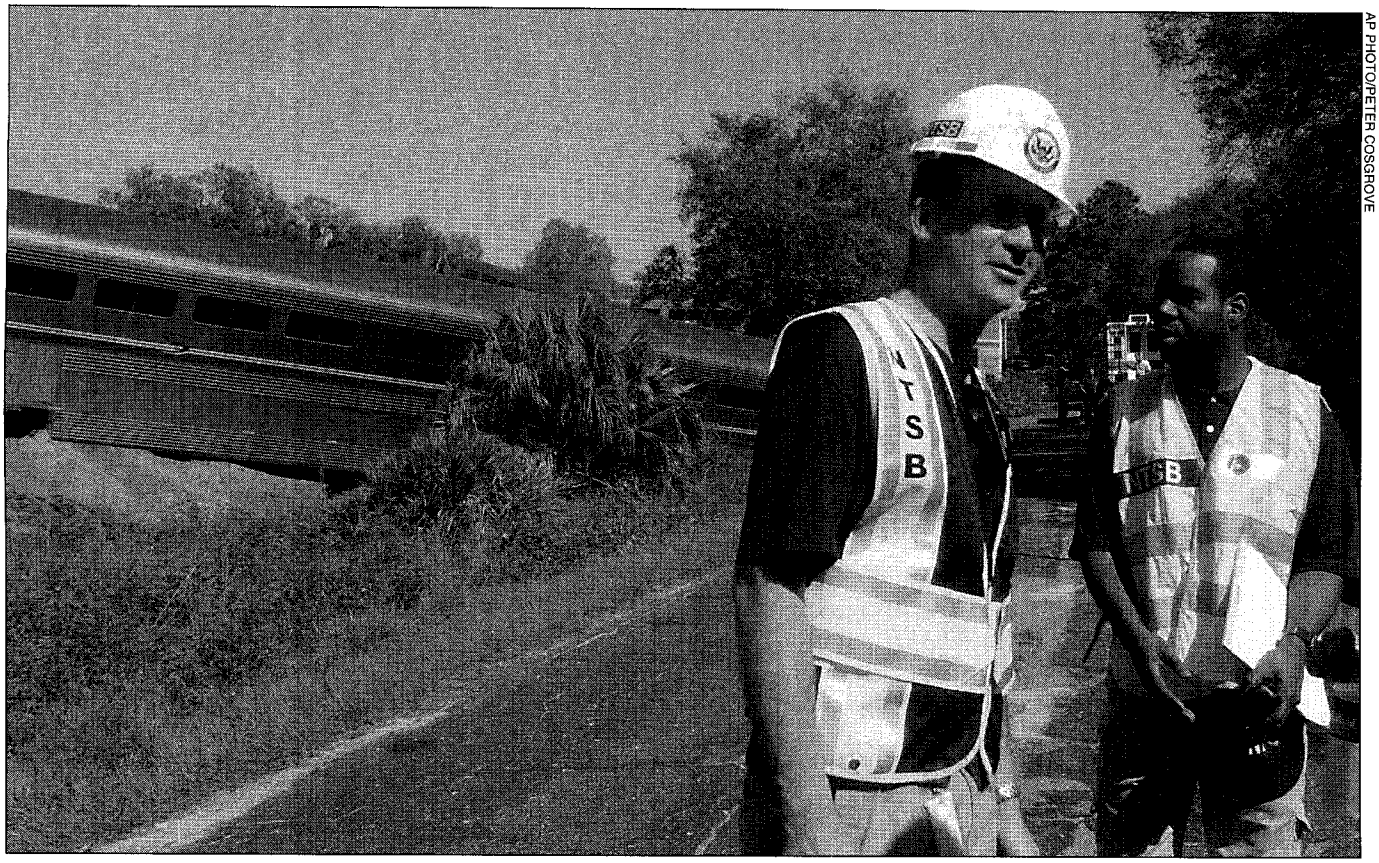
The American criminal justice system, in sharp contrast, has no institutional mechanism to evaluate its equivalent of a catastrophic plane crash, the conviction of an innocent person. In fact, an emphasis on finality and procedural due process in our post-conviction procedures has for too long obscured both the frequency and implications of wrongful convictions. This point is vividly illustrated by the 110 post-conviction DNA exonerations that have occurred in the United States in the 10 years preceding September 1, 2002.[1] Although these cases all involve convictions on serious felony charges that were affirmed on direct appeal, and often upheld after post-conviction proceedings in both state and federal courts, there has never been a

1. A running list and description of post-conviction DNA exonerations compiled by the Innocence Project is available at http://innocenceproject.org.



AP PHOTO/PETER COSGROVE

Like the National Transportation Safety Board, which investigates aircraft, railroad, and other accidents and issues recommendations, innocence commissions could review the causes of any officially acknowledged case of wrongful conviction and recommend remedies to prevent such miscarriages of justice from happening again.

detailed opinion written about what went wrong in any of these cases, much less an analysis offering suggestions on what could be done to prevent similar miscarriages of justice.

Instead, the exculpatory DNA results are received, an order vacating the conviction (or a gubernatorial pardon) is issued, and, in a few cases, the judge or the governor offers an apology. To confound matters further, many, but by no means all, of the public officials who should be most concerned about the underlying causes of such wrongful convictions blithely proclaim that the "system has worked" and assiduously avoid the suggestion there is anything further to investigate.[2] Those officials who want to get to the root of these problems do not have an independent body to which they can turn for further investigation or policy recommendations.

In order to address effectively underlying, institutional problems that contribute to the conviction of innocent persons, we propose the creation of "innocence commissions"[3] to investigate and monitor errors in the criminal justice system just as the NTSB investigates and monitors airplane and other major transportation accidents in the United States. Simply put, innocence commissions should be automatically assigned to review the causes of any officially acknowledged case of wrongful conviction,[4] whether the conviction was reversed with post-conviction DNA tests or through some other new evidence of innocence, and recommend remedies to prevent such miscarriages of justice from happening again.

There is no one best way to create state or federal level innocence com-

2. *E.g. see* Bailey, *DNA Clears Man Jailed 22 Years, But Door Still Shut,* The Commercial Appeal , May 3, 2002, at A1, where District Attorney General Bill Gibbons, commenting on the exoneration of Clark McMillan, a man wrongly convicted of rape and robbery and who served 22 years in jail, longer than any other exoneree, before DNA evidence proved he was innocent, said "I think it shows our system works." *See also* Marshall, *Do exonerations prove that "the system works?"* in this issue (page 83).

3. It has been suggested by colleagues that the term "innocence commission" is both "too narrow" because the reforms expected to emerge from such bodies would not just protect the innocent but also lead to the apprehension of the guilty, and politically undesirable as the phrase "innocence commission" would be seen as a term favorable to the criminal defense movement. *See* Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions,* 38 CAL. W. L. REV. 333, 353 (Spring 2002). This point may be correct. We have always wanted "innocence commissions" to be understood as organizations dedicated to a public safety imperative, generating findings that would be perceived as just, good law enforcement. The political process will ultimately determine whether the term "innocence" is loaded and identified as a criminal defense code word. We like the term because it goes to the heart of what the average citizen expects of the criminal justice system "to protect the innocent, apprehend the guilty, and correct mistakes when the innocent are wrongly convicted."

4. The Innocence Project's list of post-conviction DNA exonerations is composed entirely of such "officially acknowledged" wrongful convictions. A DNA exoneration is defined as any case where a conviction was vacated on the grounds of new evidence of innocence from DNA testing and the indictment was dismissed without subsequent prosecution, the defendant was pardoned by a governor, or the defendant was acquitted after trial.

missions. One can easily envision such a commission being formed through legislative enactment, executive order, or appointment by the chief judicial officer of a state. Even the formation of an interdisciplinary group by a non-profit organization, or a state university system, could be the vehicle for an innocence commission as long as that entity is delegated appropriate legal authority and resources to conduct fact-based investigations. These entities must not merely be "study commissions" offering policy recommendations, but investigative agencies whose findings arise from direct review of actual cases.

Thus, the key, necessary features of an innocence commission will be subpoena power, access to first- rate investigative resources, and political independence. Like the NTSB, an institution whose example is well worth emulating, these commissions must be trusted to speak out continually about cases where the system fails, without fear or favor, even if their recommendations are, for a while, ignored by political, law enforcement, or judicial bodies.

What follows is an effort to explain why innocence commissions can serve as a capstone reform that keeps in place a recurring systemic examination of defects and remedies in the criminal justice system before the current "learning moment" brought about by post-conviction DNA exonerations fades. This discussion is intended to offer practical suggestions on what the organizing principles of such commissions should be, taking into account the political realities of criminal justice reform in the United States.

Canadian and British models

Fortunately, we are not writing on a blank slate. In Canada and Great Britain there are two distinctly different kinds of institutions that address the problem of wrongful convictions that could serve as good working models.

The Canadian "Public Inquiries" model. Canadian "Public Inquiries," also known as Royal Commissions or Commissions of Inquiry, were first established more than 150 years ago as a way for sovereignties to conduct independent, non-government-affiliated investigations regarding the conduct of public businesses or the fair administration of justice.[5] Each province and the federal Canadian government has passed legislation enabling the establishment of these independent public inquiries. Based on a direction from the executive branch, a public inquiry can be "chartered" to have designated persons (frequently judges) investigate almost any issue of public concern. Canadian Public Inquiries have investigated a wide-range of issues including contaminated blood supplies in the nation's hospitals and the status of women.

Recently, however, separate public inquiries were conducted in the wake of two celebrated post-conviction DNA exonerations, Guy Paul Morin and Thomas Sophonow, producing comprehensive reports that both reviewed the specific circumstances of each case and issued findings regarding systemic practices "that may have contributed to or influenced the course of the investigation or prosecution."[6] The designated leaders of the Morin and Sophonow Public Inquiries had subpoena power, held hearings, recruited, when necessary, government laboratories or independent experts, and issued reports that dealt with the specific causes of these wrongful convictions and made policy recommendations about remedies to prevent wrongful convictions in the future.

With some significant modifications, and drawing heavily upon the American experience with the NTSB, we believe the Morin and Sophonow inquiries represent a good model to track when designing innocence commissions in the U. S.

The British Criminal Case Review Commission model. The Criminal Case Review Commission (CCRC) of Great Britain is, according to its own description, "an independent, open, thorough, impartial and accountable body investigating suspected miscarriages of justice in England, Wales, and Northern Ireland."[7] By most accounts, since its establishment in January 1997, the CCRC has evolved into an admirably effective and substantial governmental agency.[8] If, after going through its four-stage process of screening and investigation, it finds a "real possibility" of an "unsafe" conviction or an unjust sentence, the CCRC can refer the case back to the appellate courts for further action, or make a recommendation for a Royal pardon. While the CCRC does on occasion discuss the causes of wrongful convictions and remedies, such analysis has not been its principal mission, as the work of the CCRC occurs *before*, not *after*, an official acknowledgment by the courts that a wrongful conviction has occurred.

The CCRC has a 14-member board of distinguished citizens; two thirds are lay persons, one third are lawyers, and one third must have some sort of criminal justice expertise. The majority of investigations are handled by the CCRC itself and its staff. Where a case calls for specialized knowledge, the CCRC may hire an expert to examine the evidence and issue a report. The CCRC has the authority to inspect and order the preservation of all materials held by a public body. It does not have a similar mandate for materials in the possession of private organizations or individuals, nor does it have the power to carry out searches, check criminal records, or make an arrest, but it can appoint an investigating officer, such as a police officer, who does have such powers, to work on the CCRC's behalf.

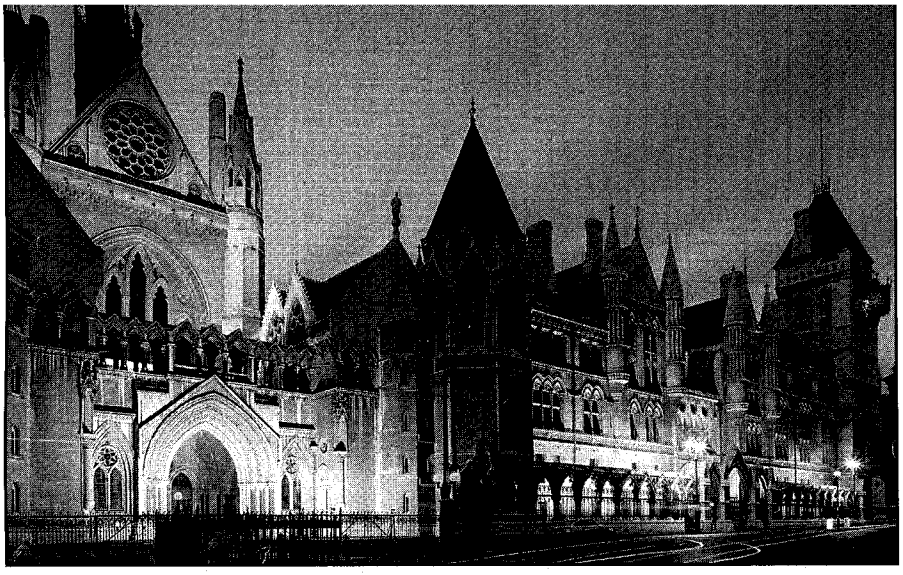
An investigation is not considered complete until the CCRC shares its findings with applicants and offers

5. Sellar, *A Century of Commissions of Inquiry*, 25 CANADIAN BAR REV. 1, 1 (1947).

6. *See*, "Thomas Sophonow Inquiry Report, " Province of Manitoba. Report available at: http://www.gov.mb.ca/justice/sophonow/toc.html.; and "Report of the Commission On Proceedings Involving Guy Paul Morin" Report available at: http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm.

7. *See*, http://www.ccrc.gov.uk/.

8. *See*, Findley, *supra* n. 3, at 7-9; Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U.L. REV. 91 (2000); Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001).



The Royal Courts of Justice, London. The British Criminal Case Review Commission investigates suspected miscarriages of justice in England, Wales, and Northern Ireland.

them a chance to comment on the investigation. Once an investigation is completed, the CCRC decides whether to recommend the case for appeal. This decision must be made by at least three board members. Since 1997, the CCRC has received 3,680 applications, 2,381 of which have been reviewed as of October 31, 2000. Of those, 203 have been referred. Among the referrals, 49 have been heard and 38 of those (77.5 percent of referrals, 1.6 percent of the original completed applications) resulted in quashed convictions.[9] If a decision for referral is made, it is up to the applicants and their legal representative to make their case in appellate court. If an application is not referred to an appeals court, the applicant may apply again if new evidence or arguments appear in the future.

Notwithstanding the remarkable progress made by the CCRC in just five years, it is not the model we envision for "innocence commissions." This is certainly not because the United States has no need for institutions like the CCRC to pursue post-conviction claims of innocence. On the contrary, compared to the network of comparatively small and resource-starved innocence projects that have been formed at law schools, journalism schools, and public defender offices throughout the United States, which endeavor to exonerate the factually innocent,[10] the CCRC is an impressively efficient, powerful, and superior institution.

Rather, our reluctance to advocate this model arises from practical and political concerns. Proposals based on a CCRC model could be too easily, albeit unfairly, attacked as requiring large government bureaucracies based on un-American notions of an inquisitional justice system that would squander precious law enforcement funds on prisoners making frivolous claims. On the other hand, following the example of the NTSB and Canadian Public Inquiries, proposals for smaller public bodies charged with exposing the root causes of wrongful convictions that have already been established as miscarriages of justice, will be a better first step in building an effective reform movement to redress basic flaws in the American criminal justice system. Ultimately, as public understanding grows about the prevalence of wrongful convictions, institutions based on the CCRC model will be created. The CCRC, after all, was formed as a result of public outcry over revelations from public inquiry investigations into the notorious wrongful convictions of IRA defendants in the Birmingham Six and Guilford Four cases.[11]

A "learning moment"

Courts, scholars, and policy makers are all beginning to recognize that the most important aspect of the wave of post-conviction DNA exonerations is what it can teach us about all the other cases (the vast majority) where DNA testing is not available. This wave of exonerations has probably not crested. As states pass post-conviction DNA statutes (there are now 27),[12] providing inmates an opportunity to prove their innocence, exonerations have and will continue to increase. But it would be short-sighted not to assume the wave of DNA exonerations will eventually pass and foolish not to capitalize on what is plainly a "learning moment."

Most recently, a United States District Court judge, Jed Rakoff, citing the serious doubts regarding the reliability of guilt or innocence findings in non-DNA cases raised by post-conviction DNA testing, actually found the federal death penalty an unconstitutional violation of due process.[13] While some have derided the decision as "eccentric" and unlikely to be sustained by appellate courts, those commentators generally acknowledge the factual premise of Judge Rakoff's argument and agree that post-conviction exonerations in capital and non-capital cases, primarily through DNA testing, strongly "suggest[s] that the number of false convictions is higher than previously understood," which creates a need to

9. Griffin, *supra* n. 8, at 1277.

10. A running list of innocence projects working within the "innocence network" can be found at http://innocenceproject.org/about/other_projects.php.

11. The "Guilford Four" case involved the dismissal of charges against suspected IRA members when evidence was found conclusively proving that the police had fabricated the defendants supposed confessions. In the "Birmingham Six" case, the court overturned IRA convictions based on defendants' confessions when it was revealed that the supposed confessions had been drafted by the police after the fact. See Griffin, *supra* n. 8, at 1248.

12. A running list, text, and analysis of post-conviction DNA statutes, as well as the Innocence Protection Act, a bi-partisan bill in Congress that would mandate post-conviction DNA testing in every state, is available at http://innocenceproject.org.

13. *United States v. Quinones, et al*, No. S3 00 Cr. 761 (JSR) (July 1, 2002).

address the "innocence" issue directly.

Empirical study by scholars of the wrongful convictions uncovered in the past decade has begun with renewed seriousness.[14] The case study approach for analyzing wrongful convictions laid out in 1932 by Professor Edward Borchard in his classic work, *Convicting the Innocent: Sixty-five Actual Errors of Criminal Justice*, and powerfully supplemented by Hugo Bedeau and Michael Radelet's research regarding capital cases 52 years later,[15] will surely be followed by more statistically sophisticated analyses similar to those employed by Professors James Liebman and Jeffrey Fagan and their colleagues in studies examining reversals in death penalty cases.[16] As the pool of documented wrongful convictions rapidly grows, deconstructing the underlying patterns will become increasingly possible, and academics from many disciplines will certainly take advantage of this "learning moment."

Policy makers have also responded to the issue of convicting the innocent with a series of "study" commissions that have focused on wrongful convictions in capital cases and reform in the administration of the death penalty. Reports from commissions in Nebraska, Indiana, Virginia, Maryland, Arizona, and Illinois have either been produced or are due soon.[17]

The Report of the Governor's Commission on Capital Punishment, a study requested by Governor George Ryan after he declared a moratorium on the death penalty in Illinois is by far the most impressive for its content and transparency. The Ryan Commission "carefully scrutinized" all 13 death row exonerations in Illinois, studied every reported decision in a pending capital case, held public and private hearings, consulted with nationally recognized experts, and commissioned their own empirical study of capital sentencing. In terms of our definition, as opposed to other study commissions, the Ryan Commission functioned as a true innocence commission because it derived its findings directly from the study of actual cases within the jurisdiction. Significantly, the Ryan Commission was strongly influenced by the methodology and findings of the Guy Paul Morin and Thomas Sophonow public inquiries in Canada, whose reports, again, arose from thorough study of two wrongful convictions.

Ultimately, the Commission made 85 detailed recommendations for reform and produced a valuable set of appendices. While many of these recommendations addressed problems specific to the administration of the capital punishment system in Illinois, most of the findings that related to problems associated with wrongful convictions, as the commission itself emphasized, were applicable to the entire criminal justice system.[18]

Soon after the Ryan Commission Report was released in April of 2002, leaders of the Illinois legislature expressed serious doubt about whether many of the 85 recommendations would be enacted in any form.[19] Nor can it be said that the Morin and Sophonow public inquiries in Canada have resulted in rapid or comprehensive reforms despite the fact that the two Canadian inquiries reached similar findings. This should not come as a surprise. State legislatures and criminal justice bureaucracies are not known for their flexible response to complex problems. Most state criminal justice systems consist of elected district attorneys from different counties, some rural and some very urban, as well as small and large police departments; it is not a simple matter to get these comparatively autonomous actors to engage in coordinated or uniform change.

So it should not be cause for despair that reforms recommended by study commissions, which are mainstream, sensible, and bi-partisan, seem to be ignored. Rather, the important institutional question is how to maintain a steady public focus on underlying problems and remedies so the natural inclination of the political actors and law enforcement bureaucracies to resist them can be overcome. Can the creation of innocence commissions consistently spotlight systemic defects in the criminal justice system long after the "learning moment" of DNA exonerations ends? We think the history of the NTSB provides an encouraging answer to this question.

The NTSB example

The NTSB was created by statute in 1974 to "investigate . . . and establish the facts, circumstances, and probable cause of" aircraft, highway, rail-

14. The first survey study of post-conviction DNA exonerations can be found in Sheck, Neufeld, and Dwyer, *Appendix 2: DNA Exonerations at a Glance*, in ACTUAL INNOCENCE, first and second editions, (2000, 2001)..

15. Bedeau and Radelet, *Miscarriage of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Radelet and Bedeau, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

16. Liebman and Fagan, et al, "A Broken System: Error Rates in Capital Cases, 1973-1995," available at http://www.justice.policy.net/proactive/newsroom/release.vtml?id=18200; and "A Broken System, Part II: Why There is So Much Error in Capital Cases and What Can be Done About It," available at http://www.justice.policy.net/cjreform/dpstudy/study/index.vtml.

17. When Republican Governor of Illinois Ryan declared a moratorium on the death penalty, he also appointed a blue ribbon committee to examine the causes behind and offer reforms to prevent wrongful convictions. That report was released in the spring of 2002 and is available at: http://www.idoc.state.il.us/ccp/ccp/reports/commission_reports.html. While a proposed moratorium on the death penalty in Nebraska failed, an extensive state-sponsored study released in 2001 of the administration of that state's death penalty found that economic and geographic disparities were the most prevalent impediments to preventing wrongful convictions and offered a number of reforms. The study can be found at: http://www.nadp.inetnedr/Study Page.html. Maryland's Governor also ordered a comprehensive two-year study of the death penalty in March 2001. Results are expected sometime in 2003. Indiana released its study commission findings in December of 2001. Results of commission studies in Virginia, and Arizona are pending. *See*, Liebman and Fagan, et al, *supra* n. 16, at 1.

18. Ryan Commission, at Chapter 14, General Recommendations, and Recommendation 83. *See also* Thomas Sullivan, *Preventing wrongful convictions*, in this issue (page 106).

19. *See*, McKinney, *Capital Punishment Reform? Don't Bet on it this Year*, Chicago Sun-Times, April 16, 2002, at 8: "Election year realities mean few lawmakers want to cast votes to scale back capital punishment, as the commission advises, and be portrayed as soft on crime, post-Sept. 11. 'I don't think this will be popular," said Senate President James 'Pate' Philip (R-Wood Dale),...who said he'd be surprised if there was any action on the issue this year."

20. 49 U.S.C. § 1131, generally § 1101-1155 (2000). The NTSB was originally created in 1966 under the Department of Transportation, where it languished. The independent NTSB as we know it today was established by the Independent Safety Board Act of 1974.

road, or major marine accidents and to issue reports and reform recommendations to the Secretary of Transportation.[20] It has five members, appointed by the president, with the advice and consent of the Senate, and, most importantly, it operates independently from the Federal Aviation Administration.

Prior to the establishment of the NTSB, air traffic safety regulations were left to the FAA. Watchdogs complained that the FAA suffered under its so-called "dual mandate," to simultaneously promote air commerce and air safety, and the NTSB was established to take over safety investigations and relieve the FAA of this conflict of interest.

The NTSB may "do anything necessary to conduct an investigation."

At its own discretion, the NTSB forms a "special board of inquiry" following "an accident involv[ing] a substantial question about public safety." Investigators are selected by the NTSB Board; other interested parties may petition to be included, at the complete discretion of the Board, in the investigation. NTSB investigators have broad powers to conduct thorough investigations. Indeed, according to its enabling legislation, the NTSB may "do anything necessary to conduct an investigation." The investigating committee may issue subpoenas and compel sworn testimony; order autopsies and other forensic tests "when necessary to investigate an accident;" and may bring a civil action in federal court against any party that obstructs its investigation. Although the NTSB does not have the right to guarantee the confidentiality of witness statements, interviewees do have the right to have counsel or a non-legal representative present during the interview and the right to have any party, besides the actual interviewer, excluded from the interview.

Upon completion of an investigation, the NTSB delivers a report consisting of two parts to the Secretary of Transportation: a factual record containing all of the witness statements, factual observations, and discoveries made by the investigators; and a set of reform recommendations. The secretary is required by statute to give a "formal written response to each [NTSB] recommendation," within 90 days of receiving an NTSB report. The secretary must state publicly whether the reform recommendations will be adopted in whole, in part, or not at all.

The findings and recommendations of the NTSB cannot be used as a basis for civil or criminal liability, although the factual record it creates can obviously be marshaled as evidence in such proceedings.[21] In civil trials, NTSB investigators cannot be called on to testify, although parties may depose such investigators once, and use that deposition at trial. During their deposition, investigators are allowed to reference their notes and the factual record. The factual report is also admissible at trial as a public document exception to the hearsay rule. As for criminal trials, investigators may testify without restrictions in state or local grand jury hearings or criminal proceedings.

The NTSB has been criticized as powerless to implement its own recommendations, but this weakness is really a source of strength and independence. Since it doesn't have to concern itself with anything except safety, the NTSB is not hamstrung by cost or political worries; it can afford, year after year, to repeat findings that make the FAA, the airline industry, and the federal government uncomfortable. A recent study by the Rand Institute for Civil Justice concurs in this assessment, describing the NTSB as an agency that "enjoys the reputation of being the most independent safety investigative authority in the world."[22]

The Rand study notes that although the NTSB is not a regulatory agency and its charge to make recommendations regarding airline safety does not carry with it enforcement authority, the fact that commercial air travel has become accessible for millions increases the intensity of media and public scrutiny of major airline accidents, thereby enhancing the persuasive power of NTSB investigations and recommendations. Given these circumstances, an NTSB statement of cause may not legally bind the FAA to implement changes, but it certainly can bring about calls for change that "publicly" bind the FAA to adhere to NTSB recommendations.[23]

Essential elements

The NTSB example, accordingly, helps underscore what elements are essential in any proposal to form viable innocence commissions and suggests ways to modify some features of the Canadian Public Inquiry model:

(1) Innocence commissions should be standing committees chartered to investigate, at their own discretion, any wrong-

21. Carlisle, *Comment: The FAA v. the NTSB: Now that Congress has Addressed the Federal Aviation Administration's "Dual Mandate," has the FAA Begun Living Up to Its Amended Purpose of Making Air Travel Safer, or is the National Transportation Safety Board Still Doing Its Job Alone?* 66 J. AIR L. & COM. 741, 757 (2001).

22. The Rand Institute for Civil Justice, *Personnel and Parties in NTSB Aviation Accident Investigations*, pg. xiii., at http://www.rand.org/publications/MR/MR112.1/MR112.1/pdf.

23. *Id.* at pg. xxv. It should also be observed that some commentators are concerned that recent case law, mandating deference to FAA interpretations of laws and regulations, has begun to undermine the latitude of NTSB investigations and the ability of the NTSB to effect regulatory changes from the FAA. *See,* Singer, Garvey v. National Transportation Safety Board: *The FAA Gets its Cake and Eats it Too,* 66 J. AIR L. & COMM. 875 (2001).

ful conviction[24] *and to recommend any public policy reforms they deem necessary.*

One problem with the Canadian Public Inquiry model is that its investigations must be triggered by a direction from the executive branch. Aside from the danger that the executive branch simply won't charter investigations it doesn't like, this approach also runs the risk that review of officially acknowledged wrongful convictions only occur as a response to public pressure. Hopefully, the opposite dynamic will be in play. By routinely examining wrongful convictions, including cases that are not "high profile," innocence commissions will be able to bring serious scrutiny and public attention to serious problems and misconduct that would have otherwise been ignored and forgotten;

(2) Innocence commissions need the power to order reasonable and necessary investigative services, including forensic testing, autopsies, and other research services.

It seems wise to keep the permanent innocence commission bureaucracy as small as possible, expanding on a contractual basis when a case demands it. Usually existing agencies, such as state or local crime laboratories, could provide adequate forensic services. In fact, this is the approach taken by the Morin and Sophonow Canadian Public Inquiries, who sent the forensic evidence pertaining to the case to provincial laboratories. And while the Morin inquiry cost the province around $3 million, most of these costs were associated with the cost of providing every intervenor with their own counsel in addition to the investigative resources expenses accrued. It is conceivable that an effective innocence commission could operate on a far smaller budget. For example, a commission's initial inability to create civil or criminal liability to any of the participating parties may cut down on attorney's fees.

On the other hand, innocence commissions should not be stymied in their investigations by arbitrary budget cuts from the executive, the legislature, or even the administrative office of the judiciary. One solution might be arbitration or court review of disputes over requests for investigative resources;

(3) Innocence commissions must have the power to subpoena documents, compel testimony, and bring civil actions against any person or entity that obstructs its investigations.

Such powers are simply indispensable. Without the ability to lift up flat rocks and see what's underneath, innocence commissions will revert to being weak, ineffectual "study" groups that can be disregarded with impunity by those who most need exposure. The incredible and indispensable revelatory power of depositions is exemplified by the "Ford Heights Four" case.[25] In 1978, three men and one woman were convicted of the abduction and murder of one woman and the murder and rape of another. The men were primarily convicted based on a tip from a man claiming to have seen them near the murder scene and the testimony of a co-defendant who was forced to confess to the crime and then offered a reduced sentence if she agreed to testify against her co-defendants. The convictions of all four were overturned in 1999 based on DNA testing that excluded them as the perpetrators. Only during depositions taken in preparation for the exonerees civil suit against Cook County was it revealed that the convictions rested on evidence and information never turned over to the defense, due to police and prosecutorial misconduct. It is clear from this egregious example that depositions are a necessary mechanism for any procedure dedicated to identifying the causes leading to wrongful convictions.

(4) The findings and recommendations of innocence commissions should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the commission can be made available to the public.

Like the NTSB, this feature of an innocence commission will ultimately prove to be a source of strength, not weakness, a way to preserve independence and insulate the commission from political pressures. Nor will it unfairly restrict civil or criminal cases.

As a practical matter, federal civil rights litigation for victims of wrongful convictions are very difficult and often prohibitively expensive undertakings. Prosecutors have absolute immunity from civil lawsuits for any actions they take while engaged in litigating a criminal case, even if it includes unlawful, even criminal suppression of exculpatory evidence, and qualified immunity (good faith is a defense) for their investigative activities.[26] Police officers have qualified immunity for their conduct outside the courtroom, and absolute immunity for in court testimony.[27]

The legal issue of qualified immunity can be the subject of interlocutory appeal, thereby greatly protracting the time and expense civil rights plaintiffs must expend during litigation.[28] And quite frequently, the lawsuits would have to be filed against law enforcement officials with great power in the community. Lawyers are extremely reluctant to take on such matters unless a "slam dunk" constitutional violation is apparent from the record. It is highly unlikely

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24. A wrongful conviction should be carefully defined. Ordinarily, it should embrace just those cases where a conviction has been vacated based, in part, on new evidence of innocence, and the indictment was subsequently dismissed, the defendant was acquitted, or the governor issued a pardon. The innocence commission should, however, have discretion to reach tougher cases, such as instances where new evidence of innocence leads to a conviction being vacated and a deal is struck permitting an *Alford* or *nolo contendre* plea to time served. Such arrangements are often impossible for an innocent defendant to turn down and invite abuse, especially if law enforcement officials insist on such an arrangement in order to avoid an innocence commission inquiry.

25. For a more detailed report, see Protess and Warden, *A Promise of Justice*, at: http://www.law.northwestern.edu/depts/clinic/wrongful/readings/warden_protess/TOC.htm. Lawrence Marshall and Thomas Sullivan also discuss this case in articles in this issue, see *Do exonerations prove that "the system works? (page 83) and Preventing wrongful convictions* (page 106).

26. *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed.2d 209 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed.2d 128 (1976).

27. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001) (qualified immunity); *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed.2d 96 (1983) (absolute testimonial immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982) (qualified immunity).

28. *Mitchell v. Forsyth*, 472 U.S. 511, 524-530, 105 S. Ct. 2806, 86 L. Ed.2d 411 (1985).

that an innocence commission investigation will get in the way of a plaintiff seeking civil relief; if anything, revelations from an innocence commission investigation might provide the stimulation lawyers need to pursue meritorious but costly lawsuits.

Similarly, criminal prosecutions arising out of law enforcement misconduct in wrongful conviction cases are very rare, and generally arise only when evidence is overwhelming or public pressure compels a serious investigation. It's hard to imagine innocence commission investigations unduly hampering criminal prosecutions;

(5) Innocence commissions should be transparent, publicly accountable bodies, composed of diverse, respected members of the criminal justice community and the public.

A major reason for the creation of innocence commissions is to bolster public confidence in the fairness of the criminal justice system. It goes without saying that its members must command respect, represent all sides of the criminal justice system, and reflect the diversity of the public it serves. Nor would the goal of enhancing public confidence be well served if innocence commissions operate with the secrecy of a grand jury, or if they conduct public hearings that are designed more for drama than gathering useful information.

A balance needs to be stuck. There are plain advantages to the Canadian Public Inquiry method; it permits interested parties to call and cross-examine witnesses and it uses liberal rules of evidence. On the other hand, innocence commissions must be careful not to drag out their inquiries; they need clear authority to exercise sensible control over the length and breadth of their proceedings. In terms of transparency, it should be noted that the CCRC's annual reports, website, and disclosure of budgetary information stands as an excellent template; and

(6) Innocence commissions should be required to file public reports on their findings and recommendations, and the relevant branch of government to which these reports are submitted should issue a formal written response to the recommendations within a fixed period of time.

Innocence commissions should be seen as a capstone reform.

As noted at the outset, state criminal justice systems are sufficiently diverse in structure that one could anticipate innocence commissions to be created by the legislature, the executive, or the judiciary branches. In theory, it does not matter how such entities are formed as long as appropriate organizing principles are followed that permit the commissions independence and genuine capacity to investigate and make meaningful recommendations. As demonstrated by the NTSB, from whose charter this proposed element is drawn, the success of an innocence commission will not necessarily turn on whether its recommendations are immediately adopted. Ultimately, what matters most is that the findings and recommendations are clearly elucidated and made transparent to the public, and the relevant branch or branches of government to whom they are reported respond in writing within a fixed period of time. Such a procedure ensures that innocence commissions will over time become an increasingly valuable, independent public force for remedying the causes of wrongful convictions.

A capstone reform

Innocence commissions should be seen as a capstone reform because they have the capacity, through the recurring perusal of wrongful convictions, to provide a consistent, powerful impetus to remedy systemic defects that bring about wrongful convictions. While criminal justice politics will inevitably swing between "liberal" and "conservative" eras, the fundamental desire of citizens to make sure the system can reliably determine who is guilty and who is innocent should remain constant. That is why anchoring innocence commissions to actual cases where there have been undeniable miscarriages of justice is a sound long-term strategy.

It is encouraging to see leaders in the judiciary, the legislature, and the executive branches of government and members of the academy propose different kinds of innocence commissions. Soon, however, the process of experimentation must begin in the laboratory of the states; inventive judges, legislators, and governors should act before the "learning moment" occasioned by the exoneration of so many innocents begins to wane.

In 1927, Yale professor Edward Borchard, perhaps the father of modern "innocence" scholarship, made a memorable plea to Governor Lowell Fuller for a commission to investigate the convictions of Sacco and Vanzetti. "I write to you," Borchard stressed, "not as a radical sympathizer with the convicted men, but as a person interested in the preservation of our legal institutions. This depends on earning and retaining the respect of the public for those institutions. In a democracy, the confidence of the public in the fair and unbiased administration of justice lies close the roots of orderly government."[29] We couldn't agree more.

29. Letter to Massachusetts Governor Alvin Fuller from Edwin Borchard, dated April 21, 1927. Borchard Papers, Yale University Archives.

PREVENTING WRONGFUL CONVICTIONS

Implementing the recommendations of the Illinois Governor's Commission on Capital Punishment will provide significant safeguards against further wrongful convictions in both capital and non-capital cases.

By Thomas P. Sullivan

The implementation of the recommendations of the recently issued Report of the Illinois Governor's Commission on Capital Punishment[1] will provide significant safeguards against further wrongful convictions in both capital *and* non-capital cases. Perhaps the most significant recommendation for the overall criminal justice system is No. 83:

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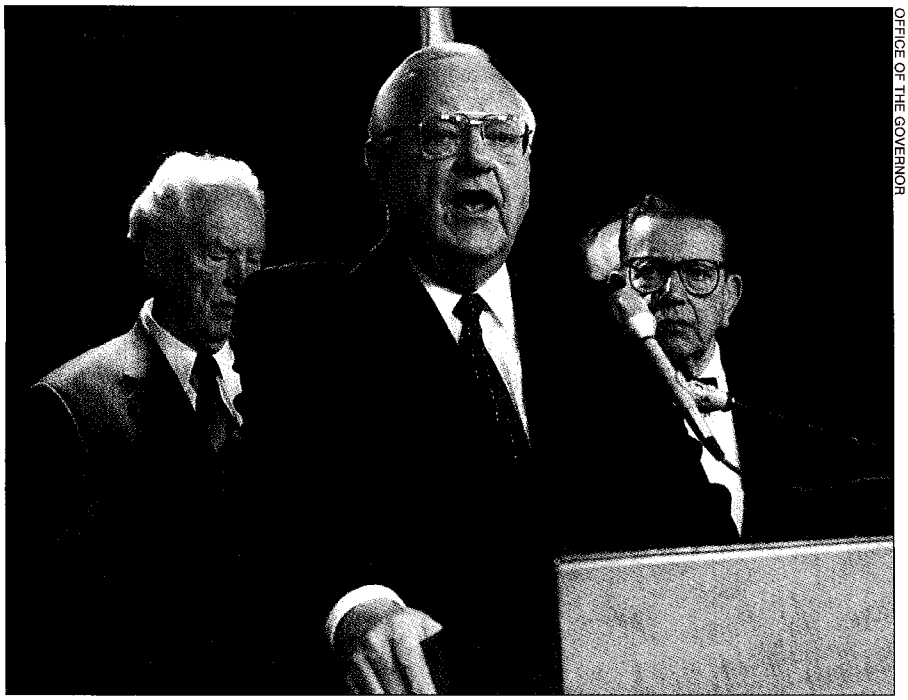


OFFICE OF THE GOVERNOR

Illinois Governor George Ryan announces the Commission's recommendations at a press conference in April, 2002.

> **The Commission strongly urges consideration of ways to broaden the application of many of the recommendations made by the Commission to improve the criminal justice system as a whole.**
>
> **Recommendation 83**

Recommendation 83 resulted from the realization that many of the reforms suggested for capital cases ought to be adopted in all felony

prosecutions, not just those relatively few (less than 3 percent in Illinois) in which a death sentence is sought. The Commission pointed out that a sentence for life or for an extended period of years

> . . .is severe, and the possibility that innocent persons may suffer as a result exists. . . In light of this, recommendations made in this Report with respect to gathering of evidence, avoiding tunnel vision, protection against false confessions, eyewitness evidence, DNA evidence and the caution about problems associated with certain types of cases, such as those involving in-custody informants, apply with equal force to cases where non-death sentences are imposed.

The 14 members of the Commission brought to the table decades of prosecutorial and defense experience in the criminal justice system. Members included two elected county state's attorneys and three former assistants; the chief of staff of the Chicago Police Department; two former assistant Illinois attorneys general; a former U.S. attorney and four former assistants; the former chief judge of the federal district court in Chicago; the Cook County Public Defender and the State Appellate Defender; the Deputy Governor who has oversight responsibility for the State Police, the prison system and forensic lab; a former U. S. senator; and the son of a murder victim. The report was the result of two years of consultation with police, prosecutors, defense lawyers, judges, exonerated defendants, families of victims, and experts, and study of voluminous relevant literature.

The Ford Heights Four

This article explores the application of the Commission's recommendations to non-capital cases. Before turning to specifics, however, it is instructive to consider the so-called Ford Heights Four case, involving a brutal multiple rape and double murder in 1978 in a suburb of Chicago. Four young African-American men, who became known as the Ford Heights Four, were arrested within a few days. An eyewitness identified them as being near the scene at about the time of the crimes. A young mentally impaired woman was taken into custody, and after extended questioning without counsel present made a statement and testified before the grand jury implicating the four men. Although she soon recanted her testimony, the four were prosecuted for murder and rape, and the woman as an accomplice. Eventually two of the four were sentenced to death, and the other two and the woman were given long prison sentences. After multiple appeals and several retrials, the convictions and sentences were affirmed by the reviewing courts.

Years later, while post-conviction proceedings were wending through the courts, a Northwestern University journalism professor and several students undertook an investigation of the two death cases. *They uncovered a police interview report of an interview with a credible witness, which took place six days after the crimes were committed, in which the witness correctly identified and named the four men who had committed the crimes.* They also learned that the police had *done nothing* to verify the witness' statement, apparently because by the time the interview took place the Ford Heights Four had been arrested and publicly identified as the culprits by the authorities. In the vernacular, the interview report was "deep sixed." The professor and students obtained confessions from two of the four actual rapist-murderers (one of whom had murdered another person in the interim). The three surviving perpetrators were convicted and given long prison terms. By the time the four were released from prison in 1996 they had served a total of more than 60 years in jail. Their civil suit was later settled for $36 million.

These two mistaken death sentences were among the 13 that moved Governor George Ryan to impose a moratorium on executions in Illinois. The case serves as a horrible example of what can go wrong in the criminal justice system: police failure to pursue and suppression of exculpatory evidence; police inducement of a mentally retarded "accomplice" to accuse the defendants in exchange for a promise of leniency; inaccurate cross-racial eyewitness identifications; a jailhouse snitch's false testimony as to defendants' alleged admissions; inept, poorly prepared defense counsel; overzealous prosecutors who introduced perjured testimony and spurious scientific evidence; inept, poorly prepared defense lawyers; and judges seemingly blind to the potential for injustice.[2]

My point here is this: *if none of the defendants had received the death penalty, all four would probably still be in prison today, and the real criminals undetected.*

1. The report, issued April 15, 2002, may be found at www.idoc.state.il.us/ccp. The references supporting the Commission's recommendations will not be repeated here.

The reason is that, as the Commission states in its comment to Recommendation 83, capital cases tend to receive a higher level of post-conviction scrutiny than cases that result in sentences to life or a term of years. It seems unlikely that the Ford Heights Four case would have attracted the attention of the professor and his students, or anyone else for that matter, if two of the defendants had not been under a sentence of death.

With this in mind, I now turn to the many recommendations of the Illinois Commission that ought to be considered for enactment in all jurisdictions for all felony cases.

Police investigations

In most criminal cases, the police provide the bedrock foundation upon which our justice system rests. Accurate, efficient police investigatory work is essential to the proper operation of the criminal justice process. We are fortunate that most of our police are dedicated, honest public servants who put themselves at risk in order to protect all members of the public, and who make serious efforts to identify culprits. But like the rest of us, they are subject to human frailties and error. They sometimes fall victim to "tunnel vision" or "confirmatory bias," bending their efforts to proving a suspect guilty, dismissing or belittling exculpatory evidence instead of taking an objective view of the proof. As illustrated by the Four Heights Four case, they may fail to pursue credible leads, and steer witnesses to accuse the person they have concluded committed the crime.

To attempt to remedy this situation, the Illinois Governor's Commission made a number of recommendations regarding the police function, which apply with equal force to investigations of capital and non-capital cases:

- The police should pursue all reasonable lines of inquiry, even after a suspect is identified, and retain schedules of all relevant evidence, which they should supply to the prosecutor.
- If requested, appointed counsel should be made available to indigent suspects during police interrogation. Under current Illinois statutes, the Public Defender cannot be appointed for an indigent suspect who is in custody unless and until he or she is taken to court. Hence, for an indigent suspect who is detained for questioning at the police station prior to charges being filed, the *Miranda* promise of an appointed lawyer will not be fulfilled. Accordingly, the public defender should be authorized to represent indigent suspects during custodial interrogation, prior to appearance in court.
- Videotaping should be required of all questioning of suspects in police custody. In many cases in which the police allege that the defendant has made an admission or confession, the defense files a motion to suppress, alleging that the defendant was mistreated, misled, abused, his or her will overborne, or that the police are misstating what occurred. The trial judge and perhaps the jury are then required to weigh conflicting versions of events. In several of the 13 capital cases that led to Governor Ryan's moratorium, police testified to confessions or admissions by defendants who were later exonerated.

To put an end to such disputes, and to have an accurate record of what occurred, all questioning of and statements made by suspects at police facilities should be videotaped. Police investigators should also carry tape recorders for use when questioning suspects outside the station, and statements that are not videotaped should be repeated on tape. The use of videotapes to record suspects' statements has been mandated by two state supreme courts (Alaska and Minnesota), and has been used successfully by a number of police departments throughout the country.

The objections to this proposal, which have been raised by police and prosecutors, center around cost and the risk of interfering with successful methods of questioning suspects. The extra costs will largely be repaid by eliminating the need for extensive report writing and court testimony as to what occurred. Defense challenges to confessions and admissions should dramatically decrease in the face of videotapes of the events. The major beneficiary of this process will be the truth-seeking process—the acknowledged aim of litigation—because spurious and exaggerated claims of coercion and perjury will be defeated, and officers will be restrained from using improper tactics in station house interrogations.

- Interviews of significant witnesses whose testimony may be challenged should be recorded electronically. All trial lawyers are aware of pliable witnesses, those whose testimony can be shaped by persuasive interviewers, and those whose tentative versions of events can evolve and be made more certain by repetition and suggestion. Implementation of this recommendation should assure that the witness' evidence will be preserved in its initial, untutored form. Here too the search for the truth will be advanced.
- There should be a major change in the procedure police use to conduct lineups and photo spreads. In his recent opinion declaring the death penalty unconstitutional, Judge Jed Rakov stated, "...it appears reasonably well established that the single most common cause of mistaken convictions is inaccurate eyewitness testimony."[3] A recent analysis

2. The full sordid story of the Ford Heights Four investigation and prosecution is explained in detail in Judge William O'Neal's Memorandum Opinion and Order in Gray v. People, 78 C 4865, 84 C 5543 (July 13, 2001) (www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Gray.htm), now on appeal by the state to the First District Appellate Court, and in Protess and Warden, A PROMISE OF JUSTICE: AN 18 YEAR FIGHT TO SAVE FOUR INNOCENT MEN (Hyperion, 1998). After a detailed factual and legal analysis, Judge O'Neal concluded that the police "disdained and abrogated their duties as law enforcement officers to protect the innocent... and to determine, through lawful investigation, those who committed the ...crimes. Their conduct, particularly the coercion of Ms. Gray to tell their concocted, inculpatory story, and subsequent suppression of reliable evidence pointing to the guilt of others, was both abhorrent and illegal. The People, or certain prosecutor(s), violated their duty to conduct an honest and fair prosecution in this case." (p. 349). *See also*, Marshall, *Do exonerations prove that "the system works?*, 86 JUDICATURE 00 (2002).

So far as I am able to determine, no discipline has been imposed on any of the police or lawyers involved, and several of the police were promoted.

3. United States v. Quinones, S3 00 Cr. 761 (JSR) (July 1, 2002).

conducted by the Associated Press of 110 inmates whose convictions were overturned by post-conviction DNA testing shows that almost two-thirds were cases of mistaken identification.[4]

One of the reasons for this alarming situation has been traced to the procedure customarily used by police when dealing with eyewitnesses: all of the subjects or their photos are shown simultaneously to the witness, who is then asked if he or she can select the perpetrator from the group. This method has been shown to result in many mistaken identifications because witnesses tend to select the person or photo that most resembles their recollection of the perpetrator. In other words, the witnesses tend to make *relative* rather than *absolute* identifications.

Recent research shows persuasively that if the persons in the lineup or photos are displayed to the witness sequentially, that is, one-by-one, and the witness' confidence statement is recorded before the next person or photo is shown, far fewer wrong identifications result, without a significant reduction in accurate ones. The reason for increased accuracy has been explained by Professor Gary Wells and his colleagues:

> ...the standard identification procedure, in which the eyewitness examines the full set of lineup members at once, allows for relative judgment processes in ways that a sequential procedure would not....Having not yet seen the remaining lineup members, the eyewitness is not in a position to make a relative judgment. Although the eyewitness could compare the person being viewed to those viewed previously, the eyewitness cannot be sure that the next person to be viewed will not be an even better likeness to the culprit. Hence, the eyewitness must rely more on an absolute judgment process.[5]

This procedure should be administered by a person who is unaware of which person or photo is the suspect, to avoid the risk of the administrator signaling, consciously or unconsciously, the suspect's identity. The administrator should tell the eyewitness that the suspected perpetrator might not be in the lineup or photo spread, and therefore the witness should not feel compelled to make an identification. This is intended to avoid the risk that a witness will make an inaccurate identification because he or she thinks that one of the persons or photos is the culprit.

All questioning of and statements made by suspects should be videotaped.

When practicable the lineup procedure and the witness' statements should be videotaped. Here too the truth-seeking process will be enhanced with a contemporaneous film of the witness' reactions and degree of confidence in recognition or non-recognition.

Procedures for lineups and photo spreads similar to those described above have been recommended (not mandated) by the United States Attorney General and the Attorney General of New Jersey.[6] A majority of the members of the Illinois Governor's Commission agree with the research that shows that use of these procedures will reduce substantially the dangers inherent in eyewitness identifications.

Pretrial proceedings

• In most jurisdictions, prosecutors and defense lawyers are often required to cross examine witnesses they have never seen or spoken to before the witness enters the courtroom. This situation presents one of the most curious anomalies of our country's jurisprudence, that is, pretrial depositions are permitted freely (and often to excess) for discovery in civil cases involving money or property, but not in criminal cases with freedom and sometimes life at stake. There is no good reason why depositions should not also be permitted in felony cases. If restrictions are deemed expedient, then depositions ought to be permitted by the trial judge upon a showing of good cause.

• As with civil cases in most jurisdictions, in all felony cases the trial judge should hold regular case management conferences. And prior to trial the prosecutor should file a certificate that he or she has conferred with all those who participated in the investigation or trial preparation, and that all required information has been disclosed to the defense.

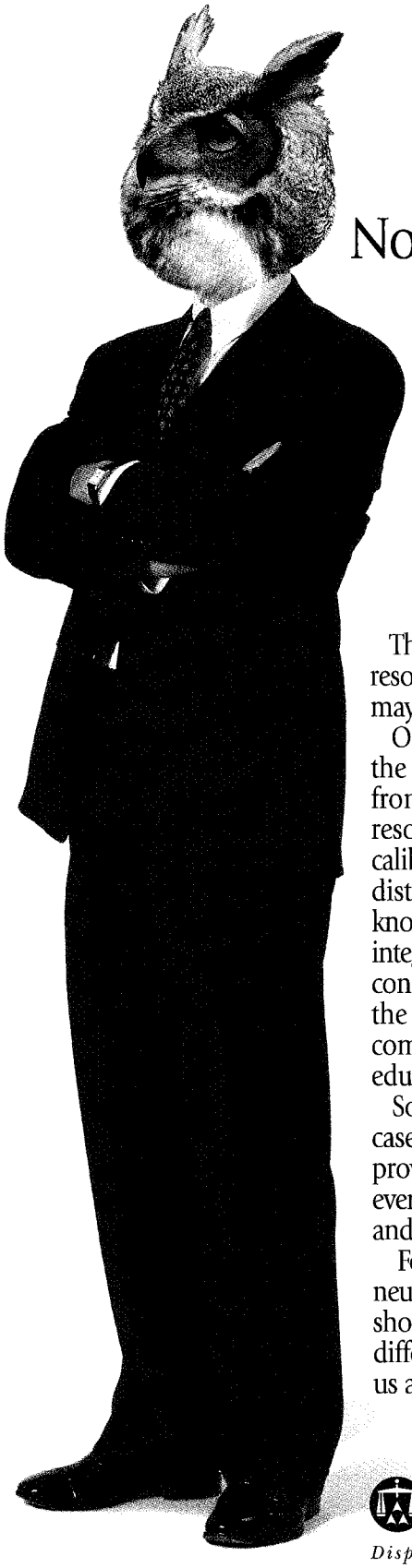
• In many cases leading to wrongful convictions, deals have been struck between the prosecution and witnesses that have been kept from the defense and trier of fact, as in the Ford Heights Four case. Accordingly, all discussions or arrangements between prosecution witnesses or their representatives regarding benefits or detriments should be reduced to writing, and full disclosure made to the defense.

• Prosecutors sometimes bolster questionable proof of guilt with the testimony of in-custody informants, a.k.a. jailhouse snitches, as to alleged admissions or confessions made by cellmate defendants. The testimony is usually tendered by the informant in hopes of obtaining leniency for himself. Snitch testimony has often proven to be fabricated. To protect the defendant, it is recommended that special pretrial procedures be adopted to test the admissibility of such testimony. If the prosecutor intends to use snitch testimony, he or she should promptly inform the de-

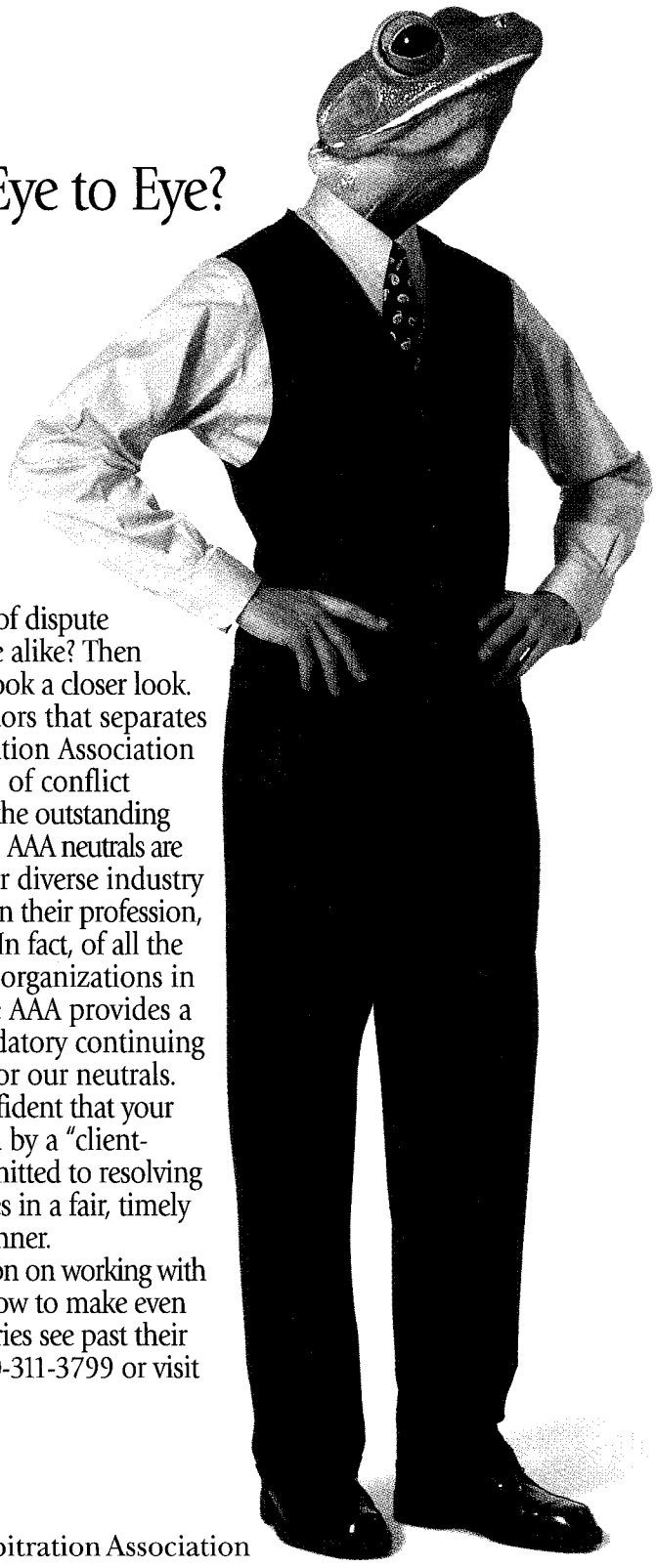
(continued on page 120)

4. The AP analysis is summarized at http://129.186.143.73/faculty/gwells/DNAcasesAPstudy.htm.

5. Wells, et al, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW AND HUM. BEHAV. 617 (1998).



Not seeing Eye to Eye?



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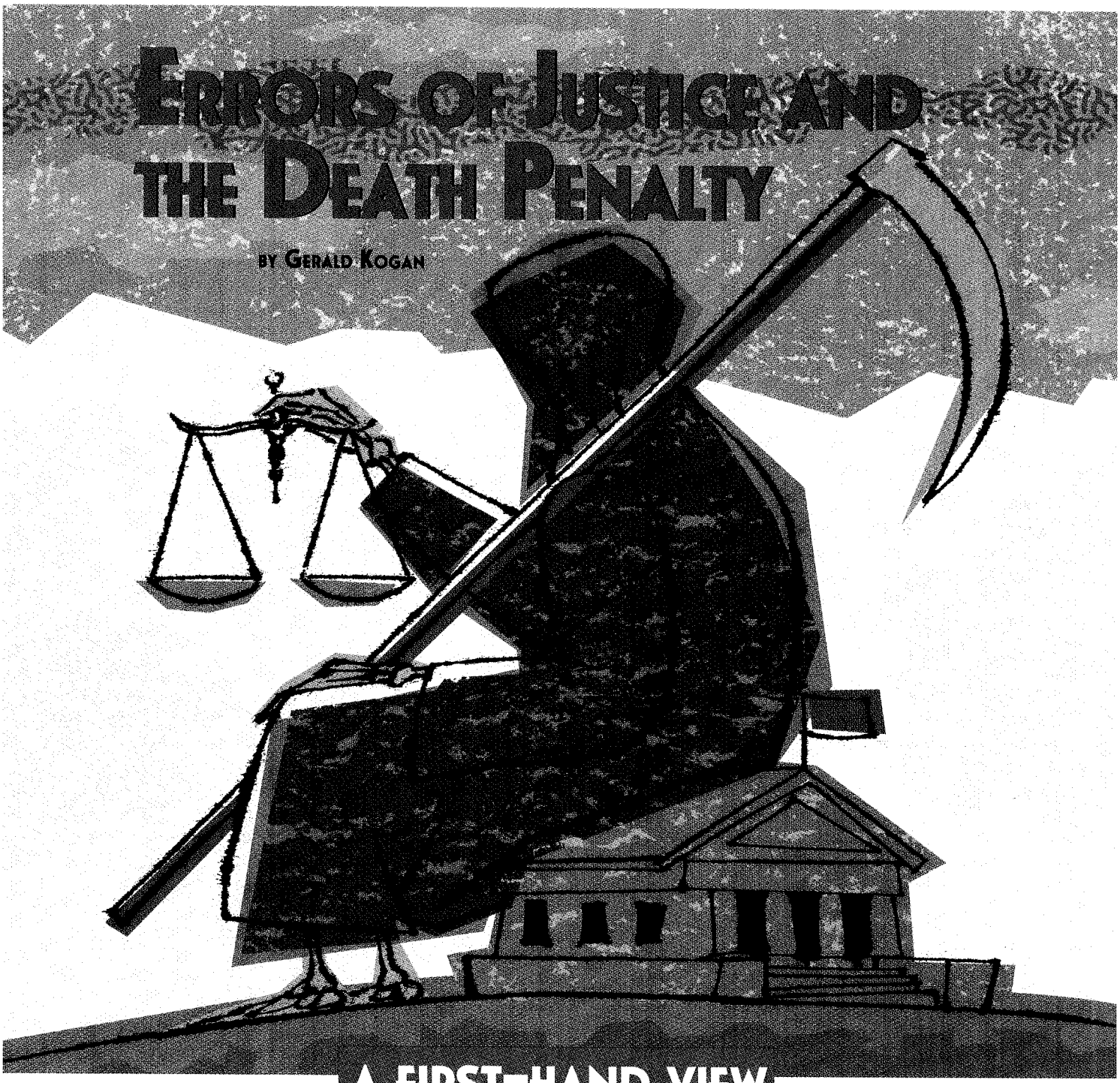
Errors of Justice and the Death Penalty

BY GERALD KOGAN



A FIRST-HAND VIEW

Experience shows that executing the innocent is inevitable. We need to realize that capital punishment involves making godlike decisions without godlike skills.

As the chief prosecutor of the homicide and capital crimes division of the Dade County State Attorney's Office, it was my job to prosecute people who were charged with capital crimes. I asked juries to sentence certain defendants to death. In many cases I instructed the prosecutors who worked under me that it was their duty to ask that the jury return the death penalty. Often the jury did just that.

After leaving the State Attorney's Office I went into private practice, doing criminal defense work where I represented people charged with capital offenses. And there the role reversed. I asked juries *not* to send my clients to their deaths. I actually had

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to appear before juries where defendants aged 15 and 16 were facing the death penalty.

Those were the days before bifurcation: there was a single trial to determine whether or not somebody was guilty of a capital offense and whether or not they were to receive the death penalty. This changed in the aftermath of *Furman v. Georgia* in 1972, when the Supreme Court found most American death penalty statutes to be unconstitutional. Today there are two phases to the trial—the guilt phase followed by the punishment phase where the jury independently determines whether or not the death penalty ought to apply.[1] Before the change, if the jurors found someone guilty of a capital offense and if they failed to recommend mercy, the trial judge had no alternative but to sentence that person to death. On the other hand, if jurors recommended the defendant to the mercy of the court, the trial judge had no alternative but to impose a sentence of life imprisonment.

Upon leaving private practice, I became a circuit court judge in Dade County, doing most of my work in the criminal courts division. As administrative judge of the criminal division, I handled numerous capital eases. Then, between 1987 and 1998, I sat on the Supreme Court of Florida, listening to the appeal on every case where a person was sentenced to death. I estimate that, in the last 40 years, I have participated either as a prosecutor, a defense attorney, a trial judge, or as an appellate judge on the supreme court in the disposition of more than 1,200 capital cases. Few people anywhere in the United States have that amount or variety of experience. The following observations are based upon what I have learned in the last 40 years.

Execution days

I would like to present my first-hand experience of what happens on a day when a person is put to death under the law of the State of Florida. Too often we think of the death penalty in almost fictional terms, forgetting that the condemned and his or her family are very real people and the death penalty, once imposed, is not retractable. I participated in the execution process six times during my two years as chief justice, along with 22 other occasions when people were executed while I served as a member of the court. On some of these cases, I signed off on the execution, believing that all of the requirements of the laws of this state had been met. In other cases I believed the execution was not constitutionally justified.

The chief justice plays a central role on execution days. I would arrive at the Supreme Court Building about 6:30 a.m., 30 minutes before the execution. I would go to the clerk's office and check whether any last minute petitions had been filed for a stay of execution. Generally, by that stage, there were none. About 6:45 a.m. the governor's office would call and the governor's counsel would ask for the green light. Whether I had been on the majority of this particular case upholding the execution, or whether I had dissented, the majority of the court rules and, as chief justice, I had to convey the majority opinion to the chief counsel for the governor.

The governor's counsel then contacts the warden at the Florida State Prison, where the execution is to take place, and says that the execution may proceed. I am then told that the warden is having the hood put over the face and the head of the accused. They then tell me, "Mr. Chief Justice, the electricity has been turned on." From that moment on, what goes through my mind is difficult to describe. But I think I can sum it up by saying, "I just hope to God that this person is in truth and in fact guilty of the crime for which he has been convicted and I hope that this person meets all the criteria that the state has set out in its law for the purpose of execution." I pray that the decision makers in the case have made the right decisions, not only about the person's factual involvement in the crime, but also about his premeditation and intent and all the other elements that make a homicide a capital case.

That is a very troubling moment, because the next voice I hear is, "Mr. Chief Justice, the electricity has been turned off and the doctor is examining the prisoner." A few moments go by—it sometimes seems like an eternity—and the governor's counsel tells me that the doctor has pronounced the prisoner dead. This is a very sobering moment for somebody who, 45 years before, never dreamed that he would be in that particular position, sitting as the only person between the state and the condemned prisoner on the question of whether or not that prisoner lives or dies. It is an awful responsibility. And I say to myself, "God, help us all if we have made a mistake."[2]

Execution of the innocent

Having seen the dynamics of our criminal justice system over the years, there is absolutely no question in my mind that we have executed people who either did not fit the criteria for execution specified by the legislature of the State of Florida or who, in fact, were factually not guilty of the crime for which they were executed.

I have seen some of the dynamics of the criminal justice system that can lead to such errors. One example is how the state makes deals with some culpable defendants facing capital charges, offering them light or life sentences in exchange for their testimony against the other participant (or in some cases giving them com-

1. In Florida, juries are not asked to make formal findings of aggravating and mitigating circumstances; they simply recommend a life or death sentence to the trial judge after hearing evidence of aggravating and mitigating circumstances. The trial judge is free to reject the jury recommendation. Whether this procedure will survive the Supreme Court's recent call for more jury involvement in determination of death sentences remains to be seen. *Ring v. Arizona*, 70 U.S.L.W. 4666 (June 24, 2002).

2. And Florida has made numerous errors in death penalty cases in the recent past. Florida leads the country with 22 inmates released from its death row since 1972 because of doubts about their guilt. For a current list of prisoners released from America's death rows since 1972 because of doubts about guilt, see http://www.deathpenaltyinfo.org/innoc.html In second place among states is Illinois, with 13 inmates released because of innocence. These cases were sufficient for Governor George Ryan, in January 2000, to declare a moratorium on executions in Illinois. However, the problem of erroneous convictions has attracted only denial from Florida politicians.

plete immunity from prosecution in order to secure their testimony). I have seen cases that use jailhouse informants whose veracity is questionable. I have seen cases based on confessions that are highly suspect. These things can lead to an uneven application of the death penalty where, in too many instances, those who are the most culpable escape death and those that are the least culpable are executed. Whether we care to admit it or not, we are human beings, capable of error, administering an imperfect system.

Yet, there is often some lingering doubt as to whether or not these particular people are factually innocent of a particular crime.[3] It is one thing to convict somebody of a crime they did not commit, put them in prison, and lock the jail cell. If a mistake is discovered, at least the prisoner can be released, and perhaps given a monetary compensation. But it does not work that way in a capital case; we cannot dig up a coffin, open up the lid, and apologize for the error. The finality of the death penalty, more than any other, causes most judges to be unusually careful.

Because of my belief that innocent prisoners have been executed,[4] I have been criticized by members of the Florida Legislature who are convinced that my assertion is incorrect. I am glad that they are possessed of such great wisdom. Only they who have never tried a capital case, who have never presided over one, who have never sat on the appellate level, who really and truly do not understand the dynamics of the criminal justice system are able to make such a statement.

We are human beings, administering an imperfect system

In part because of a concern about the execution of the innocent, we also find that the death penalty uses up a disproportionate amount of resources. In 1988, the *Miami Herald* estimated that it costs taxpayers $3.2 million to execute someone; a life sentence without parole would only cost the state $600,000.[5] While death penalty cases are only about three percent of those reviewed by the Supreme Court of Florida, death cases take almost 50 percent of the time of the justices. Consequentially, the other 97 percent of cases are pushed back in the queue.

In large part because we now know how easily we can make mistakes, I believe the death penalty is no longer a viable punishment. And since we are human beings operating in an imperfect system, we are bound to make mistakes. For that reason, and that reason alone, capital punishment should be abolished.

Innocence and abolition

One reason that many political leaders are not troubled by the possibility of erroneous convictions is that a concern about erroneous convictions would threaten the death penalty. Conversely, if we are to make progress reforming our criminal justice system in ways that might decrease miscarriages of justice, capital punishment will have to be abolished. The abolition of the death penalty is not going to come about by trying to convince people that the death penalty is wrong, or that it is not one of the things that a civilized society should do to any of its citizens, or that it is wrong to kill somebody to teach that killing is wrong, or that it is cruel and unusual punishment. Whether we like it or not, the polls show us that a majority of the people of this country believe that we should keep the death penalty.[6] Anyone who opposes the death penalty is put in that category of so-called "bleeding heart liberals."

The death penalty will only be abolished by legislative action. Abolition will not come from the Supreme Court of the United States. Neither will abolition come out of any state supreme court, at least as long as justices believe that the overwhelming majority of the citizens favor the death penalty. Public support for the death penalty will decline when the public learns several lessons.

First, the public needs to recognize the inevitability of executing the innocent. Since DNA technology has become widely available in the last dozen years, more than 100 innocent prisoners have been vindicated, including 12 who had been under a sentence of death.[7] The DNA evidence showed that they were factually innocent of the crime for which they had been convicted and sentenced to death. That is a frightening statistic, not only because of the dozen people who were wrongly convicted and sentenced to die, but also

3. Historically, the judicial branch was much more likely than it is today to intervene when a person on death row presented evidence of innocence. Vandiver, *The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924-1966*, 27 U. RICHMOND L. REV. 315 (1993). However, death sentences in Florida have been commuted only six times since 1972, and the last was nearly two decades ago. *See* Radelet and Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICHMOND L. REV. 289 (1993).

4. *See, e.g.*, Clark and Long, *Ex-Judge Steps Up Attack On State's Death Penalty*, Miami Herald, Oct. 24, 1999.

5. von Drehle, *Capital Punishment in Paralysis*, Miami Herald, Jul. 10, 1988, at 1. Virtually all other studies that have examined the cost of the death penalty have reached a similar conclusion. Updated information on these studies can be found at < http://www.deathpenaltyinfo.org/costs2.html>

6. A May 2002 Gallup Poll found that 72 percent of Americans supported the death penalty in at least some cases. However, this may be because they believe that absent the death penalty, murderers will be released from prison after serving only a light sentence. Given the alternative of life without parole—an alternative available in Florida and in virtually all other death penalty states—only 52 percent supported the death penalty, with 43 percent favoring life imprisonment. In addition, 40 percent of the respondents believed that the death penalty was being applied unfairly. See <http://www.pollingreport.com/crime.htm>

7. <http://www.deathpenaltyinfo.org/Innocentlist.html>

because it forces us to wonder how many persons were executed prior to the arrival of DNA technology who would have been released had we had that tool working for us. The proportion of innocent people on death row would probably have been about the same as it is today. And how about those people who are still sitting on death row today, who may be factually innocent but cannot prove their case because there is no DNA evidence that can be used to exonerate them? In most cases we are not going to have the kind of DNA evidence that would allow definitive determination of guilt or innocence for the prisoner to be saved from what is one of the biggest mistakes that our society can make.

Second, the public and our political leaders need to recognize the tremendous fiscal costs of the death penalty, and how the use of these funds on capital prosecutions makes fewer dollars available to help families of homicide victims or to fund constructive ways to help reduce the prevalence of violent criminality. We need to ask ourselves whether it is necessary for our highest appellate court to spend 50 percent of its time dealing with only 3 percent of the cases that come before it. Securing "justice" for the small number of people on death row leaves fewer judicial resources to deal with those erroneously convicted (but not sentenced to death).

There are two main reasons people support the death penalty: deterrence and revenge. Deterrence theory suggests that by executing people, we are somehow going to cut the homicide rate. The problem with this reasoning is that all of those who could be deterred will already be deterred by the threat of long imprisonment. The death penalty does not deter. Most people convicted of first-degree murder and sentenced to death are either borderline mentally retarded or mentally ill, or are committing crimes of passion that should have been charged as second-degree murder, or they are people who were under the influence of drugs or alcohol. These persons never would have been deterred and never, ever thought about receiving the death penalty as a result of their actions.

Given the absence of any deterrent effect, we are left with one justification for the death penalty: it is a tool of society's revenge. There are certain cases where the death penalty might be justified, such as in the cases of an Adolf Hitler or Osama bin Laden. Even some of the staunchest opponents of the death penalty say that, yes, there can be those cases where the conduct of certain individuals is so egregious that society does have the right to terminate their existence. But that is not what we are talking about here. We are generally talking about persons who have committed one homicide in their lifetime, not people who have killed thousands or millions of people as an act of genocide.

Securing "justice" for the small number of people on death row leaves fewer judicial resources to deal with those erroneously convicted (but not sentenced to death).

As long as politicians perceive, rightly or wrongly, that the overwhelming majority of the public is in favor of the death penalty, then they will not do anything to see it is applied more fairly or to take steps that might reduce the chances of an erroneous execution. We will not pay attention to the problem of miscarriages of justice as long as we have people like a Florida state senator who said, "I do not care if we fry 'em or inject 'em, as long as we kill 'em." As long as we have public officials with that attitude, getting them to institute reforms (such as those suggested by the Commission on Capital Punishment in Illinois[8] and those in the Constitution Project's Death Penalty Report, sponsored by the Georgetown University Law Center) that might reduce the chances of erroneous convictions will be impossible.

So, we need to explain to the citizenry what this is all about, how the death penalty interferes with other aspects of the criminal justice system, and that the death penalty is not an open and shut matter of "Let's do away with somebody because they did away with somebody else." We cannot say, "Well, that particular defendant who committed a murder in a cruel manner deserves the same type of fate as their particular victim." We need to sit down, rationalize the conversation, and tell our friends in a calm and rational matter that 1) this particular punishment requires far more of our resources than this country should be willing to invest and 2) because of the fact that you can make a mistake, if for no other reason, the death penalty should not be a viable penalty. By doing that and recognizing our human limitations, the death penalty will be abolished.

Certainly we cannot give up hope that people will recognize the inevitability of executing the innocent. We need to work for the future and see what the future brings, even if it may be in the distant future. Anything that is worthwhile deserves to be nurtured and to be carried along until it comes into fruition. We need to realize that capital punishment involves making godlike decisions without godlike skills.

8. *See* Sullivan, *Preventing wrongful convictions*, 86 JUDICATURE 106 (2002).

Causes and consequences of wrongful convictions: an essay-review

by Hugo Adam Bedau

While erroneous convictions are found throughout the criminal justice system, the consequences of these errors are especially serious in capital cases. The history of capital punishment—in this country and elsewhere, in the distant past as well as today—is a history of erroneous convictions and executions. The range and variety of irreversible errors in the death penalty system is sobering:

- The defendant was convicted of a murder, rape, or other capital crime that never occurred.
- A capital crime was committed, but the wrong person was tried, convicted, sentenced, and executed.
- The defendant did kill the victim but was insane, mentally retarded, or otherwise not fully responsible.
- The defendant did kill the victim but the killing was in self-defense.
- The defendant did kill the victim but the killing was accidental.
- The defendant did kill the victim but because of incompetent trial counsel or other error he was wrongly convicted of first-degree (capital) murder instead of another type of criminal homicide.
- It is not known whether the defendant was guilty because his guilt and punishment were settled by a lynch mob, not by trial in court.

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Every jurisdiction in the United States that has used capital punishment has imposed it on one or more defendants in one or more of these erroneous ways. What is truly amazing is the extent to which advocates of America's current death penalty system have disregarded or otherwise downplayed the significance of these irrevocable errors—as though they were relics of a distant past. Recent events suggest that this tolerance and complacency is wearing thin, however, as legislatures, governors, trial and appellate judges—state and federal—are reeling from the impact of a wide variety of research and scholarly studies identifying wrongful convictions in capital cases.

Without a doubt the most remarkable response to this research so far is also the most recent: the decision this past July by Manhattan federal district court judge Jed S. Rakoff in *United States v. Alan Quinones.* Judge Rakoff ruled that the 1994 federal death penalty statute is unconstitutional because enforcing it poses "an undue risk of executing innocent people." On July 2, 2002, the *New York Times* quoted Harvard's constitutional-law scholar Laurence H. Tribe as saying: "I've been thinking about this issue in a serious way for at least 20 years, and this is the first fresh, new and convincing argument that I've seen." In that same issue, the *Times* editorial page observed that while the decision might be reversed on appeal, "it offers a cogent, powerful argument that all members of Congress—indeed, all Americans—should contemplate."

Scope of the problem

The issue of wrongful convictions, sentences, and executions in the United States has its terminus ad quem for the present in the release in April 2002 of Arizona death row prisoner Ray Milton Krone, the 100th capital defendant to be released on grounds of innocence in the past 30 years, that is, since the death penalty was re-introduced in the mid-1970s. The terminus a quo for research on this grim subject was the study "Miscarriages of Justice in Potentially Capital Cases" by Michael L. Radelet and me, published in the *Stanford Law Review* in November 1987. That article was the first extensive and documented report on the subject—expanded (with co-author Constance E. Putnam) in our book *In Spite of Innocence* (1992)—covering the entire nation for most of the 20th century.

We co-authors were most impressed with several findings that no prior research had uncovered:

- All but six of America's death penalty jurisdictions had at least one case of wrongful conviction in a capital case.
- The most frequent cause of error was perjury by prosecution witnesses.
- The discovery of error and its rectification was usually not achieved by official participants in the system of criminal justice but by others, in spite of the system.
- In some two dozen cases, reprieve or other form of clemency leading to eventual vindication came just days or even hours before the scheduled execution.
- In all but three dozen of the 350 cases reported in the initial research, the innocence of the convicted defendant was recognized by pardon, indemnity, acquittal on retrial, or some other official action.

Critics typically have ignored these findings and refused to acknowledge the scope of the problem revealed by this research. Instead, they have concentrated on disputing the finding that among the wrongful convictions were two dozen innocent men who had been executed. The critics were quick to respond with various objections, including these three: First, all but one of the innocent-executed cases were pre-*Furman* and thus could be dismissed as ancient history, with no relevance to post-*Furman* statutory safeguards. Second, re-examination of several of the cases tended to confirm rather than disconfirm the trial court's verdict of guilty. Third, no government official in the years under study had ever gone on record admitting that he had been (an innocent) party to, or even knew of, a wrongful conviction that ended in the execution of an innocent defendant.

Perhaps the critics will reconsider their confidence that no innocent persons have been executed when they examine the findings in the recent re-investigation by James Acker and his associates of the eight New York cases in our list (one-third of the two dozen at issue). Acker et al. endorse our judgment that all eight were innocent. (See Acker, et al., "No Appeal From the Grave: Innocence, Capital Punishment, and the Lessons of History," in Westervelt and Humphrey, *Wrongly Convicted: Perspectives on Failed Justice* 154-173 (2001)).

New research

Since the work of Radelet, Bedau, and Putnam in 1992, important additional research has been undertaken by several different sets of authors, all of whom have published their results within the past three years. Heading the list by a wide margin is the well named study, *A Broken System: Error Rates in Capital Cases, 1973-1995*, by James S. Liebman, professor of law at Columbia University, and his associates. Part I of the Liebman report appeared in the summer of 2000; Part II became available in February 2002. Because Professor Liebman discusses his research in an article elsewhere in this issue, I need no more than mention it here. The same consideration applies to the second study, the report and recommendations (of April 2002) to Illinois Governor George Ryan by the special commission he created in March 2000; the co-chair of that Commission, Thomas P. Sullivan, discusses the report elsewhere in this issue.

At about the time the Illinois Commission tendered its report, Harvard Law School was host to a conference on "Wrongful Convictions: A Call to Action." The full-day conference was co-sponsored by the Boston law firm of Testa, Hurwitz, and Thibault, and by the New England Innocence Project (an affiliate of the Innocence Project created at Cardozo Law School by Barry Scheck and Peter Neufeld). Although not presenting new research as such and not confined to wrongful convictions in capital cases, the conference proceedings (available on tape from the Criminal Justice Institute, Harvard Law School) amplified printed materials distributed to the participants in a volume of nearly 800 pages, reprinting 56 articles, documents, memoranda, and reports—a virtual omnium gatherum on all aspects of the topic.

Among the many books on the death penalty published in recent years (I discussed nine of them in my essay-review in *Boston Review* for April/May 2002), only two have much to offer by way of original research that bears on the problem before us, and neither is confined to death penalty cases. One is *Wrongly Convicted: Perspectives on Failed Justice*, edited by Saundra D. Westervelt and John A. Humphrey (2001). The 14 chapters, each by a different author or authors, are grouped into four parts: the causes of wrongful convictions, the social characteristics of wrongfully convicted prisoners, illustrative case studies, and prospects for the future. The other book is *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* (2000, revised 2001), by attorneys Barry Scheck and Peter Neufeld and journalist Jim Dwyer. *Actual Innocence* is largely devoted to narratives of cases where DNA testing came to the rescue, including what the authors seem to believe was the first such case a decade ago (1992) in New York.

These books are particularly interesting due to their broadened scope. Since capital cases represent a small percentage of all criminal convictions, a reasonable inference can be drawn that large numbers of wrongful convictions occur in non-capital cases. Cases involving biological evidence, whether capital or not, are also a small percentage of all criminal cases, so the DNA exonerations examined in *Actual Innocence*, for example, may indicate a similar conclusion. That is, wrongful convictions likely occur in cases without evidence that can be tested as reliably as can biological evidence with DNA technology.

Use of DNA

No doubt the salient factor in the public's interest in the problem of convicting the innocent is the discovery that DNA could be put to forensic uses and provide virtually unassailable evidence for or against the guilt of an accused—at least in those cases (as in rape or felony-murder-rape) where traces of DNA are available and relevant. Evidence of this sort was not available in 1987, but it was

by 1994; the case of Kirk Bloodsworth (wrongly convicted of rape-murder in 1983 and released from Maryland's death row a decade later) pioneered the use of DNA results to free a prisoner on death row.

Forensic evidence from DNA testing has also had a powerful impact on courts and legislatures, and it is perhaps the dominant reform in the entire system of criminal justice currently sought by those who appreciate the impact such testing can have on the question of the guilt of the accused. As Scheck and Neufeld observed in their article in the Westerveld and Humphrey book, "Nothing comparable has ever happened in the history of American jurisprudence; indeed, nothing like it has happened to any judicial system anywhere."

All but six of America's death penalty jurisdictions had at least one case of wrongful conviction in a capital case.

A cottage industry

Recounting stories by or about innocent men released from death row verges on becoming a cottage industry. Two among the many recent additions, not surprisingly, are accounts of Illinois cases. Thomas Frisbie and Randy Garrett, in *Victims of Justice* (1998), tell the story of Alejandro Hernandez and Rolando Cruz, who spent 11 years on death row. David Protess and Rob Warden, in *A Promise of Justice* (1998), tell the story of Dennis Williams (12 years in prison) and Verneal Jimerson (18 years on death row). These cases are discussed further by Lawrence Marshall in his article in this issue.

In 1987, Bedau and Radelet reported that the most frequent causes of wrongful convictions in capital cases, in descending order of frequency, were: perjury by prosecution witnesses; mistaken eyewitness identification; coerced or otherwise false confession; inadequate consideration of alibi evidence; and suppression by the police or prosecution of exculpatory evidence. The two cases involving the four Illinois defendants mentioned above fall into this pattern. Jimerson was a victim of perjured testimony suborned by the prosecution. Williams's alibi testimony proved unpersuasive to the jury, and his attorney was incompetent by any reasonable standard. Cruz and his co-defendant were above all victims of perjury by prosecution witnesses, as well as of excessive prosecutorial zeal, erroneous expert testimony, and misleading physical evidence. In short, the causes of error in these cases were the usual ones.

Also in 1987, Bedau and Radelet reported what their data showed to be the most frequent scenarios of vindication, again in descending order of frequency: The defense attorney persists in post-trial efforts to establish his client's innocence; the real culprit confesses; a new witness comes forward; a journalist or other writer exposes the error; a private citizen discovers the error. Cruz and his co-defendant were rescued by the confession of the real murderer, the dogged efforts of a cadre of defense lawyers, and DNA evidence. Verneal Jimerson and his co-defendants were rescued by the detective work of Protess's journalism class at Northwestern University—a perfect illustration of the principle that vindication comes not because of but in spite of the system.

"Legal lynching"

Thanks to the work of capital defense lawyers—several of whom (Stephen Bright, David Bruck, Bryan Stevenson, Ronald Tabak, Frank Zimring, and especially Anthony Amsterdam) are well known through their lectures and writings—other lawyers and the law-review reading public have been thoroughly educated in the woefully unsatisfactory practices by the defense, the prosecution, and the judiciary in their handling of capital cases at trial and on appeal. This mismanagement, plus the overwhelming evidence that the part of the nation where a death penalty culture is most entrenched is in the southern states of the Old Confederacy, has sparked interest in the connection between yesterday's unlawful lynchings and today's lawful executions. So far, however, to the best of my knowledge, the only serious attempt to connect lynching and the death penalty was in passing references by James W. Marquart, Sheldon Ekland-Olson, and Jonathan R. Sorenson, in their monograph, *The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923 – 1990* (1994). Nowhere is the connection more provocatively brought to public attention than in the title of the recent book, *Legal Lynching* (2001), by Jesse Jackson, his son, Jesse, Jr., and journalist Bruce Shapiro.

Taken strictly, of course, "legal lynching" is an oxymoron, and it is tempting to dismiss the whole idea out of hand as a distorting exaggeration. But to do so would be a grave mistake. First, the mentality that once tolerated—indeed, demanded—lynching a century ago can be seen today in the mentality that tolerates—indeed, demands—continuation of our badly flawed death penalty system. Second, the states that historically were the sites of the most frequent lawless executions—lynchings—are also the states with the greatest frequency of lawful executions today. Third, the complete disregard for due process of law and the rule of law manifest in a lynching survives in the indifference and disrespect for law as the instrument of justice to be found in many (most?)

capital cases. Fourth, just as the paradigm lynchings in American history were carried out by white mobs on helpless black men as a populist method of ruthless social control, so the death penalty is to a troubling extent a socially approved practice of white-on-black violence, especially where the crimes involved are black-on-white. Fifth, many of those who opposed lynching in the South relied on the argument that the death penalty could do under color of law what lynching did lawlessly—and the record of abandonment in capital cases of any but the thinnest pretence of due process proved the point. Sixth, in cases where a posse was formed to hunt down an accused with the intention of killing him on the spot, rather than merely taking him into custody, it is virtually impossible to tell whether the killing should be judged murder by a mob or a quasi-legal summary execution.

Finally, just as the defense of lynching a century ago was predicated on states' rights and vigorous resistance to federal interference with local self-government, the attack on federal habeas corpus for state capital defendants takes refuge today, to some extent, in the same hostility to judicial intervention from Washington D.C. (This is obscured by the Supreme Court's own inconsistent attempts to regulate the nation's death penalty system, which often puts judicial restraint, respect for federalism, and deference to the legislatures ahead of substantive justice under the Bill of Rights.) One way to view the current moratorium movement, insofar as it is supported by those who seek to defend the death penalty, is to see it as the latest nationwide effort to erase the many disturbing parallels between the lynching practices of a century ago and the death penalty practices of our own day.

Reforms

This naturally leads us to inquire about the proposed reforms aimed at reducing the likelihood of convicting the innocent. The subject is too large to address in this essay-review, nor do any of the books and articles under discussion have a monopoly on recommended reforms. Furthermore, the various voices being heard are too many to summarize and evaluate here. Frequently if not unanimously recommended are two reforms: Obtain DNA evidence wherever possible, and exempt the mentally retarded from liability to a death sentence. This latter recommendation in fact became law under the Supreme Court's ruling this past June in *Atkins v. Virginia.*

Frequently if not unanimously recommended are two reforms: Obtain DNA evidence wherever possible, and exempt the mentally retarded from liability to a death sentence.

Liebman and his associates in *A Broken System* confined their 10 reform recommendations to death penalty jurisprudence. Although one of them—abolishing judicial override of the jury's sentencing decision—has become law, thanks to the Supreme Court's ruling this past June in *Ring v. Arizona,* some of their other recommendations may have a longer and rougher road to adoption. These include: Requiring proof of guilt "beyond *any* doubt" in a capital case; insulating sentencing and appellate judges who deal with capital cases from "political pressure;" and increasing compensation for capital defense lawyers to provide incentives for "well-qualified lawyers" to do the work.

Mandatory Justice: Eighteen Reforms to the Death Penalty, was released last year by The Constitution Project, part of Georgetown University's Public Policy Institute. Among its recommendations are these four: Adopt a better standard for incompetence of defense counsel than is provided by *Strickland v. Washington;* enact LWOP (life in prison without possibility of parole) as the alternative to the death sentence; conduct proportionality review of all capital convictions and sentences; and treat the jury's "lingering doubt" over the defendant's guilt as a mitigating circumstance in the sentencing phase.

Scheck, Neufeld, and Dwyer offer a list of 40 proposed reforms. Seven of

them would restrict the admissibility of eyewitness testimony. Fourteen others are devoted to controlling the evidence tendered by jailhouse snitches. Another 14 would constrain forensic laboratories and the use of their findings. Two of their proposed reforms would be relatively easy to implement: Use sequential rather than simultaneous presentation of suspects in police lineups, and videotape all interrogations.

Governor Ryan's Commission on Capital Punishment has produced by far the greatest number of recommendations—no fewer than 85. Nineteen are addressed to police and pretrial practices; the Commission also joins with Scheck et al. in endorsing videotaping of interrogations and in favoring a sequential lineup. Seven of their recommendations address the role of forensic evidence, and of course they urge wider use of DNA testing. Prosecutorial selection of which homicide cases will be tried as capital cases—one of the most troubling and unregulated areas in capital punishment jurisprudence—is the subject of three proposed reforms.

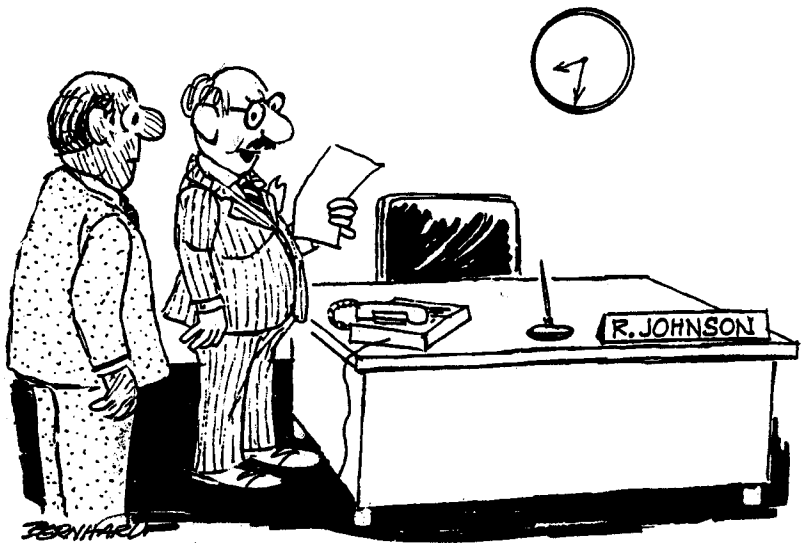
Ten of the recommendations are aimed at overhauling pretrial proceedings, including use by the prosecution of testimony by informants in custody ("jailhouse snitches"). They would not bar such testimony; instead, the Commission would require that the defense be fully informed of the prosecution's intention to use such testimony, and that the "uncorroborated testimony" of such a witness "may not be the sole basis for imposition of a death penalty." The Commission agrees with Liebman et al. in favoring "adequate compensation" for trial counsel (although their Recommendation 80 is unfortunately unclear about comparable compensation for defense counsel in post-conviction litigation).

What are we to make of these 150 recommendations (some of which overlap with each other)? Could we imagine a conference devoted to achieving a consensus on reform in which, say, 15 or 20 of these proposals received unanimous endorsement? Could the Supreme Court be persuaded to adopt some if not all of these reforms, just as it has adopted two new rules in *Ring* and *Atkins* this past spring? Or could state legislatures take it upon themselves to introduce some of these reforms, without waiting for the Supreme Court to act? We should have answers to these questions within the next few years.

The struggle continues

The Illinois Commission has done its work well and left us with a comprehensive set of model reforms. Taken together with the reforms proposed by Scheck and Liebman and their associates, lawyers, legislators, and the general public have a set of proposals that—if put into practice—would appreciably improve the system in both capital and non-capital cases. Moratorium study commissions in other states could provide re-inforcement on several proposed reforms as well. Yet everything turns on the willingness of legislatures to enact statutes that incorporate reforms. Friends of the death penalty can hardly complain if these reforms narrow the range of death-eligible defendants and increase the economic costs of the entire system, any more than its critics can complain if good-faith adoption of these reforms breathes new life into our current "broken" and deregulated death penalty system.

If the past three decades of struggle over the future of capital punishment in this country have taught us anything, it is this: The appellants in *Gregg v. Georgia* (1976) were right, and the Supreme Court was wrong. The reforms that emerged in the wake of *Furman* (1972) inspired by the Supreme Court's ruling have turned out, to a disturbing extent, to be merely "cosmetic." Astute observers of the system argued even then that it was impossible to design reforms that would be effective in bringing greater fairness into the death penalty system and still serve rational goals of deterrence, incapacitation, and retribution. Whether the death penalty system in this country that would be created if these reforms are enacted will prove to be otherwise cannot be foretold. What can be predicted is that pressure for complete abolition will not vanish or even subside. The struggle over the nation's soul will continue for some time to come.



"Johnson never could do anything right. He's absconded to South America with our accounts *payable*."

(SULLIVAN, continued from page 109)

fense as to the identity and background of the informant. The trial judge should then hold a pretrial hearing in which the prosecution has the burden of proving by a preponderance of the evidence that the testimony is reliable. The trial judge will thus act as gatekeeper, as he or she does with respect to motions to suppress evidence and challenged expert testimony.

• The recent development of DNA testing has provided a means for many wrongfully convicted defendants to establish conclusively their innocence. Accordingly, a comprehensive DNA database should be established, and all defendants should be permitted to apply for a court order to obtain a search of the database to identify others who may be guilty of the crime.

• Forensic testing should be permitted where it has the scientific potential to produce new, non-cumulative evidence relevant to the defendant's assertion of innocence.

The trial and post-trial

• Most jurors are probably unaware of the tendency of eyewitnesses to err. When eyewitness testimony is introduced by the prosecution, the trial judge should consider admitting expert testimony with respect to the problems associated with such evidence, including the difficulty of making cross-racial identifications. This testimony has been held admissible in a number of jurisdictions. It serves to educate jurors about the risks of mistaken eyewitness identifications which have infected the criminal justice system for years. When applicable, instructions should be given to the jury about the special caution to be used in assessing the testimony of eyewitnesses, in-custody informants, and accomplices, and to statements attributed to the defendant that are not recorded.

• Following conviction, the prosecutor has a continuing obligation to make timely disclosure of evidence that tends to negate the defendant's guilt or mitigate the sentence. The defendant should be permitted to apply for judicial relief at any time based upon a substantial showing of actual innocence. It is difficult to understand how there can be a principled objection to making this proposal applicable to all cases, whether the sentence is capital punishment or a term in prison.

Training

• Police, trial judges, and trial lawyers should receive training about investigative and interrogation methods; investigating and reporting of exculpatory evidence; the risks of false confessions and of false testimony by in-custody informants and accomplices; the dangers of tunnel vision; the risks of wrongful convictions; and forensic evidence. Although the Commission did not address the issue, I am of the view that our law schools, prosecutors' offices, and post-admission training courses (such as the National Institute For Trial Advocacy, the American College of Trial Lawyers, and the ABA Litigation and Criminal sections) should emphasize the special duties of prosecutors to see that justice is done in each case, to pursue exculpatory evidence, to make judgments independent of police and agents, and to protect persons who may be wrongly accused. These concepts need special attention and repetition with fledgling lawyers as well as with career prosecutors.

• Judges hearing criminal cases should be supplied on a regular basis with information about applicable law and current developments, and with adequate research support.

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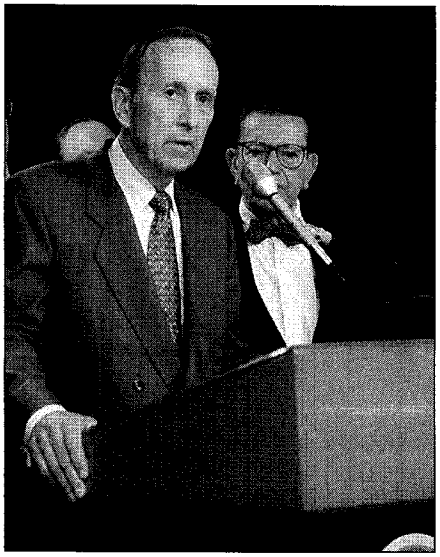
In its comment to Recommendation 83, the Illinois Governor's Commission stated:

...It is of critical importance to our state, and fundamental to our system of government, that we have a criminal justice system upon which we can rely to produce a just and fair result. Revelations of wrongful convictions and miscarriages of justice inevitably undermine the confidence of the general public in the reliability of the criminal justice system as a whole.

Thomas Sullivan, co-chair of the Illinois Commission



OFFICE OF THE GOVERNOR

There is every reason to act. Courts recently have determined that a great many innocent persons have been sentenced to death. But for every case resulting in a death sentence, there are far many more defendants sentenced to prison for life or a term of years. Accordingly, we must face the likelihood that there are a vast number of persons now in our prisons who are innocent of the crimes for which they were convicted. The protections against conviction of the innocent adopted for capital cases ought to be implemented as well in all felony cases throughout the country. g

6. "Eyewitness Evidence: A Guide For Law Enforcement," prepared by the Technical Working Group for Eyewitness Evidence, sponsored by the National Institute of Justice, U. S. Department of Justice (October 1999); "New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures" (April 18, 2001).

The Innocence Protection Act

by Peter Loge

In the past several years questioning the death penalty has gone from a "third rail" in politics (candidates would touch the issue at their peril) to politically tolerable, if not popular. There hasn't been a grand shift in the moral fabric of the nation, but rather a growing understanding of the flaws in our nation's capital punishment system. Support for the death penalty remains high, but support for addressing procedural problems that result in re-trials and innocent people being sent to death row is higher.

The Innocence Protection Act (IPA) was introduced in Congress to take advantage of this shift as well as to help promote it, and solve some of the problems that have come to the fore.

In early 2000 Senators Patrick Leahy (D-VT), Gordon Smith (R-OR) and Susan Collins (R-ME) introduced the Innocence Protection Act. A House version was introduced by Representatives Bill Delahunt (D-MA) and Ray LaHood (R-IL). Since then, the legislation has picked up bipartisan cosponsors, newspaper endorsements, and the endorsement of public policy, civil rights, and faith based organizations. Hearings on the bill were held in both the House and Senate.

The bill was re-introduced in 2001 when the new Congress convened, and now is cosponsored by one third of the U.S. Senate and well more than half of the U.S. House. In July of this year, the IPA was marked up in the Senate Judiciary Committee, and an amended version passed on a bipartisan vote of 12 – 7.

While the bill has a number of provisions, two elements are at its core: access to post-conviction DNA testing and the improvement of defense counsel in capital trials.[1]

Since its acceptance in courts, post-conviction DNA testing has exonerated more than 100 people, more than a dozen of whom had been on death row. One survey found almost 90 percent of Americans support providing access to DNA testing to those on death row.[2] State legislatures and courts are increasingly providing access to such testing. Unfortunately, there is no guarantee of access to testing, thresholds for access vary from jurisdiction to jurisdiction, and there is often no requirement to preserve evidence. The IPA addresses these problems by providing access to post-conviction DNA testing and requiring that evidence be saved. While the language in the bill has changed over time, its core remains the same.

The second provision, improving defense counsel in capital cases, also has strong public support.[3] U.S. Supreme Court Justice Sandra Day O'Connor, a life-long death penalty advocate, has expressed the need for better defense lawyers in death penalty cases.[4] And Columbia University Law School Professor James Liebman's landmark study, *A Broken System: Error Rates in Capital Cases,* found that quality of counsel was a leading cause of error.[5]

As with the DNA testing provision, the counsel provision has changed since the IPA's introduction. As introduced, the IPA would have established a commission to set national standards that states would be encouraged to adopt through funding "carrots and sticks." In the version that emerged from the Senate Judiciary Committee, the Department of Justice will make grants to states to establish or improve effective capital indigent defense systems. An effective system includes a functionally independent entity to identify and appoint defense lawyers in capital cases, maintain a roster of qualified lawyers, conduct training, and ensure reasonable compensation at a rate comparable to the typical federal rate.

The bill also authorizes new grant programs to train state and local prosecutors, defense counsel, and judges to handle capital cases better. If a state does not apply for or qualify for funds, DOJ will instead fund nonprofit capital defender organizations in the state to strengthen systems for providing indigent capital defense.

The House Judiciary Committee has been unable to schedule a markup of the legislation this fall. The IPA will be reintroduced in the 108th Congress in 2003.

***PETER LOGE** is director of the Campaign for Criminal Justice Reform of The Justice Project.*

1. A complete copy of the legislation, as well as lists of supporters, editorials, and history is available at www.CJReform.org/ipa.
2. Survey conducted for The Justice Project by Peter Hart Associates available at http://justice.policy.net/newsroom/justicepoll.pdf.
3. *Id.*
4. AP, *O'Connor Questions Death Penalty,* New York Times, July 4, 2001, at 9.
5. Liebman, Fagan, and West, *A Broken System: Error Rates in Capital Cases, 1973-1995,* available at www.justice.policy.net/proactive/newsroom/release.vtml?id=18200.